IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 46 C 1339

UNITED STATES OF AMERICA, PLAINTIFF

v.

YELLOW CAB COMPANY, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on November 10, 1948. A petition for appeal is presented to the district court herewith, to wit, on January 7th, 1949.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *National City Lines, Inc.*, 334 U. S. 573;

United States v. *Yellow Cab Co.*, 332 U. S. 218;

United States v. *Columbia Steel Co.*, 334 U. S. 495.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
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> Sec. 2. Every person who shall monoplize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monoplize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
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> Sec. 4. The several district courts of the United States are hereby invested with juris-

diction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

THE ISSUES AND THE RULING BELOW

United States v. *Yellow Cab Co.*, 332 U. S. 218, held that those allegations of the complaint filed in this case which charged the defendants with conspiring to restrain and monopolize interstate commerce (1) in the sale of cabs to the principal companies operating cabs in Chicago, New York City, Pittsburgh, and Minneapolis and (2) in the transportation of interstate railroad passengers between railroad stations in Chicago pursuant to contractual arrangements with railroads and railroad associations, set forth a valid cause of action under Sections 1 and 2 of the Sherman Act. The *Yellow Cab* case further held (pp. 230-233) that the allegations charging the defendants with conspiring to restrain and monopolize the business of operating taxicabs in the City of Chicago failed to state a cause of action under the Sherman Act.[1]

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[1] While the Court recognized that these allegations comprehended restraint and monopolization of the transportation of interstate railroad passengers from and to Chicago railroad stations and homes, offices and hotels in that City, the Court was of the opinion that such transportation, which was intermingled with the purely local operations of Chicago taxicabs and which the railroad passenger contracted for independently and used concomitantly with other means of conveyance to and from railroad stations, was not sufficiently related to interstate commerce to constitute a part of it within the meaning of the Sherman Act.

Following the foregoing decision and remand of the cause to the district court, the Government filed an amended complaint eliminating the allegations which had been held defective. The case came to trial on the amended complaint in May and June 1948, and on November 1, 1948, the district court filed an opinion holding that the evidence failed to establish any violation of the Sherman Act. Judgment dismissing the action was entered on November 10, 1948. The judgment provided that the opinion filed on November 1, 1948, should constitute the court's findings of fact and conclusions of law.

The central issue at the trial was whether the defendants had combined to control purchases of cabs by the principal cab companies operating in four leading cities, to the end that they buy their cabs exclusively from defendant Checker Cab Manufacturing Corporation (referred to as CCM). The relevant subsidiary facts as to the intercorporate relationships of the defendants at different times, the circumstances under which control was acquired over various cab companies, and the means employed to maintain and to implement control over these companies and over their purchases of cabs are complex. The Government's proof consisted mainly of documentary evidence setting forth minutes of directors' meetings of defendant companies, contracts made by them or their subsidiaries, letters to or by their officers, and

similar data. The defendants' proof, aside from a few exhibits, was confined to the oral testimony of officers of defendant companies or their subsidiaries.

The opinion of the district court deals chiefly with the facts, but the court ignored, so far as its opinion discloses, substantially all of the facts which the Government deemed significant and which, in its view, require conclusions contrary to those reached by the court. The opinion therefore seems to reflect uncritical acceptance of defendants' evidence and of defendants' views as to the facts to be given consideration in passing upon the legal issues before the court. In general, the grounds of the court's decision appear to be as follows:

Most of the cab operating companies which came under the defendants' control were acquired by defendant Parmelee Transportation Company (referred to as Parmelee) at the time of its organization in April 1929 or shortly thereafter. Such acquisitions do not offend against the Sherman Act unless accompanied by an illegal intent, which in this case would be intent to compel the controlled companies to purchase their cabs from CCM. Absence of any such intent is conclusively established by the fact that neither CCM nor Markin (CCM's president) had direct stock control of Parmelee during this period.

Although the complaint charged continuing combination among the defendants from early 1929 up

to the filing of the complaint, and although CCM admittedly acquired direct stock control of Parmelee in September or October 1930, and admittedly thereafter retained and exercised such control, the court seemed to be of the opinion that this acquisition could have no significant bearing on the charge of combination because it resulted from events which could not reasonably have been foreseen "at Parmelee's formation."

THE QUESTIONS ARE SUBSTANTIAL

In *International Salt Co.* v. *United States*, 332 U. S. 392, 396, all members of the Court joined in the holding that "it is unreasonable, *per se*, to foreclose competitors from any substantial market." In substance, the Court so ruled in *United States* v. *Yellow Cab Company*, 332 U. S. 218, with only one Justice dissenting. The appeal in this case will present the question whether this rule applies where the foreclosing of markets to competitors is achieved through a chain of stock control, the apex of which in this case was CCM, with Markin, CCM's president, coming to the apex about 1936. The question, otherwise stated, is whether the kind of vertical integration achieved in this case constitutes a defense to exclusive dealing arrangements foreclosing competitors from substantial markets.

United States v. *Columbia Steel Co.*, 334 U. S. 459, 523-526, held that the acquisition by one company of all of the assets of another company, whose business would then by conducted by a 100%

subsidiary of the purchaser, is not in unreasonable restraint of trade merely because the purchaser contemplated and intended that goods needed for carrying on the business of the acquired company would be purchased from the company which had become its parent insofar as the parent was able to supply such goods. In such case, legality or illegality under the Sherman Act depends upon the restraint or monopolization resulting from the acquisition itself. This is so because, following acquisition, the enterprise would be carried on by a parent and a 100% subsidiary and, apart from special circumstances, violation of the Sherman Act does not arise from the carrying on of a single enterprise merely because the enterprise is comprised of two or more corporate entities.

The question whether the doctrine of the *Columbia Steel* case is applicable where a company having only a minority stock interest in another company, exercises control over it by means of actual power to dominate its management, management contracts and other devices, so to bring about exclusive dealings for benefit of the controlling company, is of large public concern and clearly is substantial. To illustrate the factual basis for this issue, CCM had about 61% of Parmelee's stock and Parmelee's holdings of the stock of Yellow Cab Company never exceeded 30%, so that Yellow's purchases of CCM cabs represented exclusive dealing between

"parent" and a "subsidiary" in which the "parent" had less than a 20% stock interest.

In the event that, on appeal, the Government should fail to establish that all of the acquisitions of operating companies were motivated by the purpose to control their purchases of cabs, the appeal will present the question whether the defendants combined to prevent any loss or dispersion of control over operating companies for the purpose of assuring that they would continue to purchase cabs exclusively from CCM. The appeal will then present the question of the application, under the facts of this case, of the principle set forth in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 174, that "a vertically integrated enterprise * * * violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so." See also *idem.*, p. 173.

The appeal will present the question whether the district court committed the error which was one of the grounds for reversal of the district court's judgment in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, namely, that findings of the district court, although supported by some evidence, were "clearly erroneous" because "the reviewing court on the entire evidence was left with the definite and firm conviction that a mistake has been committed." Unless appeal is entertained to review error of this kind, final disposition of a proceeding charging substantial restraints of trade

will be governed by the factual determinations made by a single district judge and the right of appeal, authorized by statute, will be substantially nullified.

The appeal will also present the question whether the bringing under one control of Parmelee and companies which hold over 80% of all Chicago taxicab licenses constitutes a restraint on potential competition for the inter-station transfer business carried on by Parmelee, coming within the prohibitions of the Sherman Act.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 7TH, 1949.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 46 C 1339

UNITED STATES OF AMERICA, PLAINTIFF

v.

YELLOW CAB COMPANY; CHICAGO YELLOW CAB COMPANY, INC.; PARMELEE TRANSPORTATION COMPANY; CAB SALES AND PARTS CORPORATION; CHECKER TAXI COMPANY; CHECKER CAB MANUFACTURING CORPORATION; AND MORRIS MARKIN, DEFENDANTS

Opinion

The amended complaint in this action alleges that the defendants, commencing in early 1929, conspired in violation of Sections 1 and 2 of the Sherman Anti-Trust Act (26 Stat. 209, as amended) to restrain and monopolize interstate commerce in (1) the sale of motor vehicles for use as cabs to the principal cab operating companies in Chicago, New York City, Pittsburgh and Minneapolis, and (2) the transportation of railroad passengers and their luggage between railroad stations in Chicago pursuant to contractual arrangements with railroads and railroad associations.

The original complaint additionally alleged that such conspiracy extended to the business of fur-

nishing taxicab services for hire in Chicago. but this was deleted after decision by the Supreme Court that such taxicab services were local and not interstate commerce and that in this respect the original complaint failed as a matter of pleading to state a claim for relief. *United States* v. *Yellow Cab Co.*, 332 U. S. 218.

The defendant Checker Cab Manufacturing Corporation (CCM) manufactures taxicabs in Michigan and sells them to purchasers in various states. The defendant Yellow Cab Company (Yellow), all of whose stock is owned by the defendant Chicago Yellow Cab Company, Inc. (Chicago Yellow), operates taxicabs in Chicago. The defendant Cab Sales and Parts Corporation (Cab Sales) also operates taxicabs in Chicago under licenses leased from Checker Taxi Company (Checker). The defendant Parmelee Transportation Company (Parmelee) owns all the stock of three subsidiaries which respectively operate taxicabs in New York City, Pittsburgh and Minneapolis. Parmelee also has contractual arrangements with railroads and railroad associations under which it transports railroad passengers and their luggage between railroad stations in Chicago. The defendant Morris Markin (Markin) is the president and general Manager of CCM.

CCM was first incorporated in 1922 and has ever since manufactured a purpose-built cab. In 1923 its stock was publicly issued and in 1928 a second public issue was effected through the underwriting firm of J. A. Sisto & Co. Markin, in 1928, was the general manager and president of CCM, and CCM, in 1928, produced its Model K cab which received widespread acclaim.

In 1928 Ernest H. Miller, president of Yellow Taxi Corporation, New York, which operated "Yellow" cabs in New York City, initiated negotiations which led to Parmelee's formation. These negotiations, commencing in 1925, took place against a background of voluntary withdrawal by substantial interests of the "Yellow" organization in Chicago.

The Yellow organization in Chicago traces back to 1910. In 1925 its components included Yellow, Chicago Yellow and Yellow Cab Manufacturing Company, the last of which manufactured the "Yellow" purpose-built cab and supplied Yellow's cab requirements. In 1925, Yellow Cab Manufacturing Company was sold to General Motors Corporation, and shortly afterwards its name was changed, its plant was transferred, and it began to engage principally in the business of bus and truck manufacture.

In 1928 Miller informed Markin that persons owning substantial interests in Yellow Taxi Corporation, New York and Chicago Yellow desired to sell those interests. Miller asked Markin whether Markin could aid in arranging financing for such purpose. Markin consulted J. S. Sisto & Co., the underwriters through whom CCM earlier in 1928 had effected its public issue of stock. Negotiations ensued among Miller, Charles A. McCulloch, vice-president of Chicago Yellow and chairman of the board of The Parmelee Company, Markin, and J. S. Sisto & Co. in connection with which McCulloch also offered for sale stock of The Parmelee Company. J. A. Sisto & Co. investigated the proposed purchase, arranged for its financing and evolved the financial and operating structure of Parmelee.

Parmelee was formed April 12, 1929 ,with a capitalization of $10,600,000 consisting of $5,000,000 of debentures, $1,000,000 of preferred shares, and 250,000 common shares of the value of $4,600,000. Only the common shares possessed voting power. The $5,000,000 of debentures and the 250,000 common shares were publicly issued through J. A. Sisto & Co. and White Weld & Co. as underwriters. The $1,000,000 of preferred shares were purchased by CCM.

Shortly after its formation, Parmelee acquired 26 per cent of the stock of Chicago Yellow, 68 per cent of the stock of Yellow Taxi Corporation, New York, and 96 per cent of the stock of The Parmelee Company.

In connection with Parmelee's formation and the preceding negotiations, Markin, aside from discussions concerning CCM's purchase of Parmelee's preferred shares, acted in his personal capacity. Markin personally bought for himself and an associate 6 per cent of Parmelee's common shares. He also entered into an employment contract with Transportation Management Corporation, a newly formed and wholly owned subsidiary of Parmelee, to act as an adviser to Miller, president of Transportation Management Corporation. Markin's salary as such adviser was $25,000 per year and Miller's salary as such president was $50,000 per year. Prior to his subscription to Parmelee's common shares and to his employment contract with Transportation Management Corporation, Markin disclosed his personal negotiations to CCM, both at director and stockholder meetings, and requested a modification of his employment contract with CCM, under which he was required to devote his

whole time to CCM's business, so that he might enter into this employment contract with Transportation Management Corporation. CCM recognized that Markin was acting in his personal capacity, and modified Markin's employment contract with itself to permit Markin to enter into this employment contract with Transportation Management Corporation.

In purchasing the $1,000,000 of Parmelee preferred shares, CCM hoped to receive, in addition to a profitable investment, the continuing good will of Parmelee as a potential customer for cabs. CCM declined, however, a prior offer to purchase common voting shares of Parmelee rather than the nonvoting preferred shares because CCM desired the safer investment.

At Parmelee's formation, Markin was neither an officer nor a director of Parmelee or any of its affiliates; nor did Markin or CCM possess any control over Parmelee or its affiliates or any of their officers or directors.

During 1929 after Parmelee's formation both Yellow and Yellow Taxi Corporation, New York, purchased Model K cabs from CCM. No agreements, express or implied, were made, however, between CCM and Parmelee or any of Parmelee's affiliates for the exclusive or continuous purchase of CCM cabs; the 1929 purchases by Yellow and Yellow Taxi Corporation, New York, were limited to a specified number delivered that year.

Subsequent to Parmelee's acquisition of stock of Yellow Taxi Corporation, New York, and Chicago Yellow, Parmelee acquired the stock of two Pittsburgh taxicab operating companies, and later organized as a wholly owned subsidiary a Minneapo-

lis taxicab operating company. These Pittsburgh acquisitions occurred in 1929 and neither Markin nor CCM participated in them. The organization of the Minneapolis taxicab operating company occurred in 1931 and followed the receivership of a prior Minneapolis taxicab operating company owned by a local street railway company. Parmelee supplied $16,305 to purchase the receivership assets which subsequently were transferred to the Minneapolis corporation organized by Parmelee.

From the evidence the court finds that in 1929 neither CCM nor Markin possessed the power to compel Parmelee or any of its affiliates to purchase only CCM cabs; that in 1929 neither CCM, Markin nor any of the defendants formed an intent or plan to compel Parmelee or any of its cab operating affiliates to purchase only CCM cabs, and that in 1929 neither CCM, Markin nor any of the defendants formed an intent or plan to control commerce in the sales of cabs in any city or place.

At the time of Parmelee's formation Markin owned 12 per cent of CCM's stock and possessed no control over CCM's directorate. By mid-1930 Markin's ownership of CCM stock declined to 5 per cent, and of Parmelee's common stock to less than 1 per cent. At that time, CCM's largest stockholder was a group represented by John J. Raskob and Pierre duPont which owned more than 34 per cent of CCM's stock. This group and later duPont interests continued until mid-1933 to be CCM's largest stockholders. For several years thereafter representatives of Cord Corporation constituted the majority of CCM's directors. During none of this period was Markin in control of CCM.

In 1930 the following events occurred. J. A. Sisto & Co. was in financial difficulties as a result of the stock market crash of October 1929 and subsequent depression, and continued to hold without likelihood of public sale, $1,442,000 of the Parmelee debentures plus some Parmelee common shares and warrants. It sold these securities to CCM. Parmelee was incurring substantial losses, partly because of business conditions and partly because of a severe strike in Pittsburgh. Markin personally owned substantially all the stock of Motor Cab Transportation Corporation which he had previously formed and whose subsidiaries operated a large fleet of CCM cabs in New York City. The Raskob-duPont group requested that Markin dispose of his Motor Cab stock so that he would not be, through this corporation, in competition with other New York City customers of CCM. Parmelee suggested that its financial strain would be eased if the $1,442,000 of debentures and the $1,000,000 of preferred shares of Parmelee then owned by CCM, carrying a current burden of interest charges, sinking fund requirements and cumulative preferred dividends aggregating over $330,000 yearly, were exchanged for Parmelee common shares. As a result of ensuing negotiations Markin, on the insistence of the Raskob-duPont group, transferred his Motor Cab stock to CCM in exchange for shares of CCM, and CCM transferred this Motor Cab stock plus all CCM's holdings of Parmelee debentures and preferred stock plus some incidental securities, to Parmelee in exchange for 422,787 Parmelee common stock. In consequence of this transaction, CCM in the latter part of 1930 became the owner of a majority of Parmelee's

common stock. This transaction, however, was not related to any sales of CCM cabs to Parmelee or any of its taxicab operating affiliates and no accompanying intent or plan connected with any control over commerce in the sales of cabs existed on the part of any of the defendants.

At the present time, CCM owns 61.75 per cent of the stock of Parmelee, and Parmelee owns 29.5 per cent of the stock of Chicago Yellow and all the stock of three subsidiaries which respectively operate cabs in New York City, Pittsburgh and Minneapolis. Yellow, whose parent is Chicago Yellow, presently operates 1,595 licensed cabs out of 3,000 licensed and 950 temporarily licensed cabs in Chicago, or 1,595 out of an aggregate of 3,950. One of Parmelee's cab operating subsidiaries presently operates 1,932 licensed cabs out of 11,814 licensed cabs in New York City; another presently operates 485 licensed cabs out of 690 licensed cabs in Pittsburgh; and the third presently operates 125 licensed cabs out of 214 licensed cabs in Minneapolis.

Checker was formed in 1919 by a group of taxicab drivers who became its stockholders and operated their cabs under its common name. Checker performed services for these driver-stockholders, including telephone, cab stand, garage, repairs, insurance and the like, for which it received service payments. Orders from Checker for CCM cabs were among CCM's first orders in 1922. In 1925 a five year contract was made between CCM and Checker for the exclusive supply by CCM of Checker's requirements of cabs. Disputes occurred, however, with respect to this contract. These disputes were finally settled in 1930, after findings by a Special Master in CCM's favor, by

the substitution of a new five year exclusive contract expiring in 1935.

Cab Sales was formed in 1930 as a method of compensating Paul C. L'Amoreaux, CCM's attorney in the CCM-Checker litigation. He became Cab Sales' sole stockholder and Cab Sales became entitled to receive a commission on CCM Sales to Checker during the substituted five year contract. In 1931 Checker's president desired to withdraw from Checker and suggested the sale to Cab Sales of the majority of Checker's stock. Cab Sales thought this a good purchase and obtained for this purpose a substantial sum from Markin personally and loans from subsidiaries of Yellow. Numerous business factors unrelated to sales of cabs and turbulent cab operating conditions in Chicago motivated this investment by Markin and these loans by subsidiaries of Yellow. Between 1931 and 1935 Checker continued its previous form of individual-driver operation. During this period, however, large arrearages accumulated in the service charges owing by the drivers and the drivers also defaulted on purchase installments of their cabs with the result that cabs were abandoned or Cab Sales was required to repossess them. In 1935 Cab Sales commenced fleet operation of 500 cabs within Checker. This was a minority of the total number of cabs operated within Checker but Cab Sales operated these 500 cabs as a fleet while the individual drivers of Checker operated their cabs individually. Between 1935 and 1941 the individual drivers gradually dropped out as a result of their difficulties of operation and their inability or unwillingness to pay their service charges and purchase installments on cabs, so that by 1941 all

"Checker" cabs were operated as a fleet by Cab Sales.

L'Amoreaux died in 1933 and since 1934 Markin has been the owner of substantially all the stock of Cab Sales. Since 1942 substantially all the stock of Checker has been owned by associates of Markin.

From the evidence, the court finds that Cab Sales did not acquire Checker's stock to compel the purchase of CCM cabs by Checker drivers or to control commerce in the sales of cabs to Chicago or elsewhere; and that the transition in Checker to a fleet operation was in adaptation to the difficulties confronting its individual-driver operation, and was not part of any intent or plan of any of the defendants to compel purchases of CCM cabs or to control commerce in the sales of cabs to Chicago or elsewhere.

At the present time Cab Sales operates 1,000 licensed cabs out of the aggregate of 3,950 licensed and temporarily licensed cabs in Chicago.

During the period 1929 through 1942 the cab operating companies affiliated with Parmelee, and Cab Sales have generally purchased only CCM cabs; between 1942 and 1947 CCM was engaged in war production and reconversion from war production and sold no cabs. In 1947 all the Parmelee cab operating affiliates, except in New York City, and Cab Sales replaced their fleets with pleasure cars manufactured by General Motors Corporation, Ford or Chrysler Corporation.

During the period 1922 through 1928 CCM manufactured and sold an aggregate of 8,019 cabs or an average of 1,336 cabs per year. During the period 1929 through 1942 CCM manufactured and sold an aggregate of 29,260 cabs or an average of

2,090 cabs per year. CCM's pre-1929 customers included all present cab operating companies under consideration in this action or one or more of their predecessors, except Yellow. Of the 29,260 cabs manufactured and sold between 1929 and 1942, 16,996 were sold to cab operating companies named in this action and 12,264 were sold to others.

The annual average number of taxicabs operated in the United States since 1928 is estimated at approximately 85,000. The bulk of these are manufactured by General Motors Corporation, Ford and Chrysler Corporation. The CCM cab has always been a purpose-built cab. The vehicles used as cabs which are produced by the large automotive manufacturers have generally been pleasure cars converted or adapted to use as taxicabs. A purpose-built cab is a vehicle built for the purpose of use as a taxicab; its essential characteristics are safety, assembly of parts in such manner as to afford low maintenance cost, driver appeal, and passenger appeal. During the period 1928 through 1942 CCM was the only manufacturer continuously engaged in the production of purpose-built cabs. The business judgment of Checker, Yellow and the cab operating subsidiaries of Parmelee has been that the CCM purpose-built cab better served their large city needs than converted pleasure cars.

Municipal regulation of taxicabs prevails throughout most of the large cities of the United States. In most of these large cities cab operations are conducted through fleets rather than as individual driver operations and in most a large proportion of the cab licenses are held by one or two operating companies. These fleet operations generally utilize a uniform cab and replacements are

commonly obtained from the same manufacturer.

In Chicago taxicabs are regulated by ordinances of the City of Chicago. These ordinances control the physical requirements of the taxicabs and also establish and control the rates. Municipal regulations likewise control taxicabs and rates in the cities of New York, Pittsburgh and Minneapolis.

On May 9, 1853 Frank Parmelee formed the firm of Frank Parmelee & Company to specialize in the transfer by coaches of railroad passengers and their luggage between railroad stations in Chicago; in 1919 this firm became known as The Parmelee Company. Arrangements for such transfer service have existed continuously since 1853 between Parmelee or its predecessors and the railroads or railroad associations.

In the conduct of this inter-station transfer business Parmelee operates limousine coaches for passengers, trucks for luggage, and collects its compensation from the railroads. Passengers surrender to Parmelee coupons attached to their railroad tickets and furnished to them when they buy such railroad tickets. Their checked luggage is transported separately by Parmelee on trucks. Parmelee's routes between Chicago railroad stations are fixed. Its limousine coaches cannot be hired separately by any one person and passengers can travel only between railroad stations. Parmelee has offices at the several stations and its personnel is established and trained. Parmelee does not operate taxicabs for the general public in Chicago and is not subject to the taxicab ordinances of the City of Chicago.

Yellow, Checker and Cab Sales, however, have engaged only in the business of furnishing taxicab

services for hire to the general Chicago public and their operations are subject to the ordinances of the City of Chicago. As part of their taxicab services for the general Chicago public, Yellow and Cab Sales furnish cab services to and from Chicago railroad stations. None of them has or has ever had limousine coaches or trucks or the type of personnel used by Parmelee and has never engaged in the kind of service rendered by Parmelee under its contractual arrangement with railroads and railroad associations.

On the evidence the court finds that the differences between these cab operating companies and Parmelee in equipment, personnel and services are such that competition with Parmelee for such contractual arrangements with railroads or railroad associations would be impractical and unlikely; that neither Yellow, Checker nor Cab Sales has ever agreed, expressly or impliedly, not to compete with Parmelee or not to engage in such interstation transfer business; and that none of the defendants has ever, expressly or impliedly, forbidden Yellow, Checker or Cab Sales to compete with Parmelee or to engage in such interstation transfer business.

In respect of sales of taxicabs the theory of the Government is that the defendants deliberately and calculatedly purchase control of taxicab operating companies in four cities in order to monopolize and restrain interstate sales of cabs to those cities. In considering the complaint as a matter of pleading the Supreme Court, *United States v. Yellow Cab Co.*, 332 U. S. 218, 227, thus stated this theory:

> "The theory of the complaint, to borrow language from United States v. Reading Co.,

> 253 U. S. 26, 57, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred."

Later, in *United States v. Columbia Steel Co.*, 334 U. S. 495, 522, the Supreme Court said in reference to its decision in the *Yellow Cab* case:

> "In the complaint the Government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and no motion to dismiss that allegation was accepted as true."

The evidence adduced at the trial consisted of voluminous documents as well as oral testimony. On consideration of the evidence as a whole it appears to the court that the Government's theory is not borne out by the proof.

From the evidence it appears to the court that the stock relationships which developed among the defendants were not part of a design to compel the purchase of CCM cabs and were not accompanied by an intent to control commerce in the sales of cabs to any of the four cities under consideration. The affiliations which occurred were occasioned by other business factors. Thus, without reviewing each in-

stance, the status of Parmelee, which is the pivot of the Government's theory, may be considered. At Parmelee's formation in April 1929, CCM not only was without any control over Parmelee but actually refused the opportunity to take common shares of Parmelee which possessed voting power, and took instead non-voting preferred shares of Parmelee. CCM's later acquisition, in the latter part of 1930, of a majority of Parmelee's common shares was the result of a series of supervening factors consequent on the stock market crash of October 1929, none of which could reasonably have been foreseen at Parmelee's formation and none of which was connected with sales of cabs by CCM to cab operating affiliates of Parmelee. During the entire depression period conditions of financial stress continuously beset cab operating companies in general and Parmelee in particular. cf. *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291, 301. Nor did Markin possess any control over Parmelee or CCM. In the latter part of 1930 Markin's ownership of Parmelee shares declined to less than 1 per cent and his ownership of CCM shares to 5 per cent, which contrasts with an ownership of CCM shares of more than 34 per cent by the Raskob-duPont group. Raskob and duPont interests in CCM continued until 1933 and commencing in 1933 and continuing for several years afterwards Cord Corporation controlled CCM's management.

Since, on the proof, the stock relationships of the defendants did not arise as a result of a "deliberate, calculated purchase for control" over commerce in the sales of cabs, the affiliation of the defendants does not constitute a violation of the Sherman Act. *United States v. Yellow Cab Co., supra*, 227; *United*

States v. Paramount Pictures, Inc.; United States v. Columbia Steel Co., supra.

Nor, on the evidence as a whole, does the proof show that the purchases of CCM's purpose-built cabs were made under compulsion or, except for the five year and substituted five year agreements between CCM and Checker expiring in 1935, under exclusive contracts. Included in the proof to the contrary are the sale to General Motors Corporation in 1925 of Yellow Cab Manufacturing Co. which manufactured the "Yellow" purpose-built cab, and the subsequent devotion of that company principally to the production of trucks and busses; the acclaim accorded in 1928 and 1929 to CCM's Model K cab; the practice even before 1929 of many of the cab operating companies under consideration or their predecessors of buying only purpose-built cabs; the status of CCM during the period since 1929 as the only manufacturer which continuously produced purpose-built cabs; and the tendency of cab operating companies usually to replace their fleets with cabs of the same manufacture. The government has suggested that pleasure cars, rather than purpose-built cabs should, perhaps, have been bought by the cab operating companies under consideration. This, however, is within the area of business judgment and, on the evidence it appears that the business judgment of these cab operating companies was that the CCM purpose-built cabs better served their large city needs than converted pleasure cars. In *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, the Illinois Supreme Court thus referred to some of the advantages of operation in the City of Chicago of purpose-built cabs: (page 395)

"It further appears that there are certain advantages to the operation of taxicabs of special construction since they have many specially designed features for the safety, convenience and enjoyment of the passengers, and for easier operation on the public streets. Certain of these features are extra heavy frames, specially constructed bodies, specially designed brakes and steering mechanism, finger guards on door hinges, specially padded partitions, specially designed wheels, tires, ventilators and other features. Their weight is approximately 1000 pounds more than the average passenger car."

The evidence in the present case amply sustains the right of the cab operating companies under consideration to determine, as a matter of business judgment, that the CCM purpose-built cab best suits their large city needs. This business judgment should not, on the evidence, be disturbed by the court. Under these business circumstances, it appears both reasonable and natural for these cab operating companies to buy the purpose-built cab produced by its affiliate.

In *United States v. Columbia Steel Co.*, supra, 523, the Supreme Court said:

"Nothing in the Yellow Cab case supports the theory that all exclusive dealing arrangements are illegal per se.

"A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid."

The evidence does not disclose any unreasonable restraint. An additional factor affecting any question of unreasonable restraint is the control by the four cities concerned through existing municipal regulations over the issuance of taxicab licenses, the physical specifications of taxicabs, and the rates of fare.

In respect of Parmelee's contractual arrangements with the railroads and railroad associations for inter-station transfer of railroad passengers and their luggage, the Government alleges that the defendants agreed that Yellow, Checker and Cab Sales would not compete with Parmelee for such contracts. No adequate proof supports this charge nor is it shown that the defendants ever forbade Yellow, Checker or Cab Sales, expressly or impliedly, from competing with Parmelee. Nor, in view of the evidence to the contrary, does any inference of an agreement of non-competition arise from Parmelee's continued contractual arrangements with the railroads and railroad associations after 1929. The historical relationship and the contractual arrangements of Parmelee and its predecessors with the railroads and railroad associations have been continuous for nearly a century. Exclusive contract arrangements have been sustained as valid. *Donovan v. Pennsylvania Company*, 199 U. S. 279; *United States v. Yellow Cab Company*, supra, 229. For years prior to 1929 the year of the commencement of the alleged conspiracy, Yellow and Checker operated taxicabs in Chicago without attempting to compete for such contracts with the railroads or railroad associations. Yellow and Cab Sales furnish taxicab services for hire to the gen-

eral Chicago public. Their equipment, personnel and services adapted to this business differ from Parmelee's to such an extent that it would be "impractical and unlikely" for them to compete with Parmelee for its inter-station transfer business. *United States v. Yellow Cab Co.*, supra, 229.

In arriving at the findings of fact made above this court has considered the various matters of proof presented; those not specifically mentioned in the findings have been deemed intermediate in the process of ascertaining the ultimate facts. Included in this category, for example is the 1937 ordinance of the City of Chicago, under which the number of outstanding taxicab licenses in Chicago was reduced to 3,000. This ordinance, as its preamble recites, was plainly the result of a determination of public convenience and necessity and the surrenders of licenses by Yellow and Checker in pursuance of this ordinance have, under the proof, no relation to any problems of sales of CCM cabs or inter-station transfer by Parmelee.

The court finds that the defendants have not combined or conspired to restrain or monopolize, and no unreasonable restraint or any monopolization was effected by any of them, and that they have not restrained or monopolized interstate commerce either in the sale of motor vehicles for use as cabs to the principal cab operating companies in Chicago, New York City, Pittsburgh or Minneapolis or in the transportation of railroad passengers and their luggage between railroad stations in Chicago pursuant to contractual arrangements with railroads or railroad association.

Counsel will submit an order in accordance herewith.

WALTER J. LA BUY,
Judge,
United States District Court.

NOVEMBER 1, 1948.

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Brief for the U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 22

THE UNITED STATES OF AMERICA, APPELLANT

v.

YELLOW CAB COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the Northern District of Illinois (R. 89) is reported in 80 F. Supp. 936. An earlier opinion of the district court dismissing the complaint for failure to state a cause of action is reported in 69 F. Supp. 170, and the opinion of this Court on the appeal taken from the judgment of dismissal is reported in 332 U. S. 218.

JURISDICTION

The judgment of the district court was entered on November 10, 1948 (R. 104). The petition for appeal was filed and allowed on January 7, 1948. (R. 104, 108). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on March 7, 1949 (R. 1674).

QUESTIONS PRESENTED

1. Whether the evidence sustains the findings of the district court that the appellees have not conspired and combined to restrain and monopolize the interstate sale and purchase of taxicabs, with the purpose and effect of requiring principal taxicab companies in four major cities to buy their requirements from a particular manufacture[redacted]

2. Whether *United States* v. *Columbia Steel Co.*, 334 U. S. 495, modified or overruled the prior decision of this Court in the instant litigation.

3. Whether in the circumstances of this case dissipation of the effects of the unlawful combination requires severance of all stock interests and other relationships between the cab manufacturing company and the cab operating companies.

STATUTE INVOLVED

The act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *. [15 U. S. C. 1.]

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 2.]

* * * * *

SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *. [15 U. S. C. 4.]

STATEMENT

This case is before the Court for the second time. The district court dismissed the original complaint (R. 1) as failing to state a cause of action (R. 23, 30). This Court, in reversing the judgment of dismissal, held that the conspiracy among the defend-

ants to restrain and monopolize sale of taxicabs to and purchase of taxicabs by the principal companies operating cabs in Chicago, New York City, Pittsburgh and Minneapolis, as charged in the complaint, violated both Sections 1 and 2 of the Sherman Act. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225-228.

The former appeal determined the major legal issues of the case. This Court held that the commerce restrained and monopolized—interstate sales and purchases of replacements for some 5000 cabs in four cities—constituted an "appreciable segment" of interstate commerce to which the prohibitions of Sections 1 and 2 of the Act apply. *Id.*, pp. 225-226. It held that the restraints and monopolization of commerce effected by the conspiracy were of a type and character condemned by the Act. The Court so held not only with respect to defendants' action in excluding all manufacturers other than defendant Checker Cab Manufacturing Corporation from that part of the interstate cab market represented by sales to the controlled operating companies, but also with respect to their action in preventing the controlled operating companies from buying their needed cabs in a free, competitive market. *Id.*, pp. 226-227. It also held that any affiliation or integration of the operating cab companies with Checker Cab Manufacturing Corporation did not insulate the conspiracy from the sanctions which Congress had imposed. The

Court declared that common ownership and control "are impotent to liberate" a combination "from the impact of the Act" when, as was here alleged, the restraints incident to common control over previously independent concerns were not only effected by the combination of the defendants but were "the primary object of the combination." *Id.*, p. 227.[1]

After trial of the case following remand, the district court filed an opinion holding that, on the findings of fact set forth in its opinion, no violation of the Sherman Act was shown (R. 89-102). Judgment dismissing the action on the merits was accordingly entered (R. 104). The judgment provides that the court's opinion shall constitute its findings of fact and conclusions of law (*ibid.*).

The basic charge in issue on this appeal is that defendants combined and conspired to bring under their control, and to maintain control over, companies operating taxicabs in certain leading cities,

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[1] Two other charges on which this Court ruled on the prior appeal are not now in issue. The charge of conspiracy to eliminate competition for the business of transporting passengers between Chicago railroad stations was held to be within the statutory prohibitions; the charge of conspiracy to restrain and monopolize transportation by taxicab of interstate travellers between Chicago railroad stations and their homes, offices and hotels was held not within these prohibitions (332 U.S., at pp. 228-233). On remand to the district court, the complaint was amended to delete the latter charge (R. 30-33). The charge respecting elimination of competition for the business of transporting passengers between Chicago railroad stations was tried, but the Government is not now urging error in the ruling by the district court (R. 100-102) that the evidence failed to establish this charge.

with the purpose of procuring for defendant Checker Cab Manufacturing Corporation a monopoly of the business of supplying the cabs needed by these companies in their business operations. The district court, in holding that the proof did not bear out this charge, declared that "the stock relationships which developed among the defendants were not part of a design to compel the purchase of CCM cabs and were not accompanied by an intent to control commerce in the sales of cabs to any of the four cities under consideration" (R. 98). It held that "the affiliation of the defendants does not constitute a violation of the Sherman Act," and that the proof did not show that the operating companies' purchases of CCM cabs were made "under compulsion" (R. 99).

The Government proposes to show that these findings and conclusions are erroneous, that on the entire evidence this Court will be "left with the definite and firm conviction that a mistake has been committed." See *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395.

The Defendants

The detailed history of the conspiracy can be better understood if the defendants are first briefly identified and the salient aspects of their interrelationships outlined. The defendants are:

Defendants	*Designation herein*
Checker Cab Manufacturing Corporation	CCM

Morris Markin	Markin
Parmelee Transportation Company	Parmelee
Chicago Yellow Cab Company, Inc.	Chicago Yellow
Yellow Cab Company	Yellow
Cab Sales and Parts Corporation	Cab Sales
Checker Taxi Company	Checker

CCM manufactures taxicabs in Kalamazoo, Michigan, and sells them to purchasers in various states (R. 90, 94). *Markin* has been president, general manager, and a director of CCM from the time of its incorporation in 1922 except for a 12-day period in 1933 (R. 610-11; Gov. Ex. 223 (not printed [2]), R. 1290). He is also a large stockholder in CCM (Def. Ex. 7, R. 1611).

CCM owns 62% of the stock of *Parmelee*, which in turn owns all of the stock of companies engaged in major cab operations in New York City, Pittsburgh and Minneapolis (R. 90, 94). Parmelee also operates a passenger and baggage transfer business between the various railroad stations in Chicago (R. 90).

Yellow has long been the largest operator of taxicabs in Chicago (Gov. Ex. 400, R. 1425). Yellow is wholly owned by *Chicago Yellow* (R. 90), and

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[2] By stipulation, various exhibits which are part of the record in this Court have not been printed (apart from a "summary description" of the exhibit) or have been printed only in part, but any party may refer in brief or oral argument to any such exhibit or portion thereof (R. 1673-4). When referring to such an exhibit, we shall use the words "not printed" and give the record citation for the summary description.

Parmelee, through its ownership of Chicago Yellow stock and by other means, has effectively controlled Yellow (*infra*, pp. 29-34).

Checker formerly performed various services for its Chicago cabdriver stockholders (R. 94). *Cab Sales*, all of whose stock is owned by Markin, acquired control of Checker, took over operation of Checker cabs, and now leases Checker's Chicago city cab licenses (R. 59-60, 94-95). The second largest cab operations in Chicago, after Yellow's, have been those carried on first by Checker drivers and later by Cab Sales (Gov. Ex. 400, R. 1425). The cabs which they have operated, plus those of Yellow, have for a period of many years represented 2595 out of the 3,000 cab licenses in force in Chicago, or 86% of the total (*ibid.*).

The Inception of the Conspiracy

The organization of Parmelee in April 1929 was an outgrowth of a series of conferences, beginning in 1928, participated in by Markin, Ernest H. Miller, Charles A. McCulloch, and representatives of J. A. Sisto & Co. (R. 910-15). Miller was president of a company operating 1200 cabs in New York City.[3] McCulloch was chairman of the board of directors of The Parmelee Company and represented a block of between 100,000 and 115,000 shares of Chicago Yellow stock.[4] The Sisto firm

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[3] Gov. Exs. 2 (R. 969), 6 (R. 1524).

[4] R. 913; Gov. Ex. 6, R. 1527. The Parmelee Company, engaged in transferring passengers and their luggage between

was closely linked with CCM. It had underwritten an offering of CCM stock in November 1928, it held over 20% of CCM's stock, and five of CCM's nine directors were Sisto partners or associates or sponsored by it.[5]

Miller, who had originally broached the idea of forming a company to acquire stock of various taxicab companies, told Markin that the companies represented by Miller would like to buy CCM cabs but probably could not do so "because of finances" (R. 910), and Miller discussed with Markin "the possibility to buy cabs providing the present owners could be purchased," i.e., providing the deal to acquire stock of cab companies went through (R. 911).

Markin testified that the CCM directors were "all familiar" with the discussions which were being carried on to organize a company to acquire controlling interests in various taxicab companies (R. 920). As Markin put the matter, "most of the directors of Checker [i.e. CCM] were participating —knew about this entire deal, because they were mostly in Sisto's office" (*ibid.*).

Both Markin and CCM believed that the proposed combination of cab companies would ma-

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Chicago railroad stations (Gov. Ex. 6, R. 1524), was dissolved in 1934 and its business was taken over by Parmelee (Par. 22 of amended complaint, not denied, R. 43, 86).

[5] R. 809; Gov. Ex. 3, R. 974, 975. Of the nine CCM directors, one was Markin; two were Sisto partners, one (Gillespie) had his office in Sisto's office, one (Moos) was an investor whom Sisto had suggested as a director and one (Ludington) was "associated" with Sisto (*ibid.*).

terially benefit CCM by giving assurance that the companies brought under common control would purchase CCM cabs. When Markin formally presented the plan which was being worked out to a meeting of CCM's directors on January 25, 1929, he explained that the plan to amalgamate "some of the more important operating companies" provided for creating a management company to furnish "uniformity of management," and that "in this way this Company would be in a position to receive recurring orders from substantial operating companies" (Gov. Ex. 1, R. 967-8). After another director had stated that he considered the proposal "most beneficial" to CCM, the directors adopted a resolution authorizing Markin to proceed with the project (*id.*, R. 968).

As the deal was finally agreed upon and consummated in April, 1939, Parmelee acquired about 68% of the stock of Yellow Taxi Corporation of New York, about 26% of the stock of Chicago Yellow, and 96% of the stock of The Parmelee Company, and issued in exchange $5,000,000 of debentures, $1,000,000 par value of 6% convertible preferred stock, and 250,000 shares of common stock (R. 91; Gov. Ex. 2, R. 969). Sisto made a public offering of the debentures and common stock and CCM assisted in the financing of Parmelee by purchasing its entire issue of convertible preferred stock at par (R. 91).

When Markin submitted the proposed purchase

of Parmelee's preferred stock to CCM's directors for their approval at a meeting on April 5, 1929, he stated that the organization of Parmelee and its acquisition of stock in various cab companies represented a plan whereby CCM "*might obtain a sustained production by insuring recurring orders from large operating companies.*"[6] He noted that it was proposed that a subsidiary of Parmelee would agree with CCM to "endeavor to promote" sales of CCM cabs; that the plan involved an initial order for the purchase of 1000 CCM cabs at $1900 per cab payable in cash; and that "there was every prospect" that Parmelee or its sales subsidiary "would procure substantial additional orders" for CCM cabs. He also stated that a management company controlled by Parmelee would enter into a contract for management of the operating companies and that he was to be employed as an adviser to this management company at a salary of $25,000 a year. (Gov. Ex. 2, R. 969-70.)

As the minutes of the directors' meeting further record, Markin stated that he and other large stockholders of CCM considered the advantages to CCM "so substantial" that they had given Parmelee's bankers options on a "substantial block" of CCM stock at a price just above the market. The plan, he said, required ratification by CCM's stockholders, but it was "so essentially for the benefit of this Company" that there should be no difficulty in ob-

[6] Italics supplied.

taining such ratification. (Gov. Ex. 2, R. 970-1.)

The resolution approving purchase of Parmelee's preferred stock recites that in the opinion of the directors Parmelee's proposed stock acquisitions, and any future like acquisitions by Parmelee, "will be of substantial benefit to this Company" (Gov. Ex. 2, R. 971). The directors also approved a modification of Markin's employment contract with CCM, so that the requirement that he devote substantially all of his time and attention to the business of CCM should be subject to a proviso permitting Markin to become interested in Parmelee or its management subsidiary so long as he "shall continue to devote his efforts towards promoting the sales of the products" of CCM (*id.*, R. 971-2).[7]

At the 1929 annual meeting of CCM stockholders, Markin gave as the only reason for the purchase of Parmelee preferred stock that he deemed it "to be extremely advantageous in supplying a connection for marketing the products of this Corporation" (Gov. Ex. 3, R. 1480, 1487). Markin likewise brought to the stockholders' attention some of the circumstances promising effective realization of CCM's anticipated advantage.[8] By unanimous

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[7] The directors likewise approved payment to a Parmelee sales subsidiary of a 5% commission on all purchases of CCM cabs procured by Parmelee or its sales subsidiary (*id.*, R. 973).

[8] Among the circumstances referred to were his own purchase of a large block of Parmelee's stock, his option to purchase a large block of additional stock, his contract to render services to Parmelee's management subsidiary, and

vote of those present the stockholders then approved CCM's $1,000,000 contribution to the financing of Parmelee (*id.*, R. 1488).

On the very day (April 29, 1929) on which Parmelee acquired the stock of operating companies in exchange for its own securities (Gov. Ex. 5, R. 982-4), CCM received from one of these companies, Yellow, an order for the purchase of 1000 CCM cabs (Gov. Ex. 299, R. 1329). This $1,900,000 order was, indeed, swift realization of the "substantial benefit" which CCM believed would flow to it from Parmelee's acquisition of control over operating companies (*supra*, p. 11). Not only was this order concrete manifestation of the substantial benefit accruing to CCM from the combination which CCM had helped to finance and which its president had been largely instrumental in forming, but the order demonstrated the control over Yellow exercised by Parmelee from the moment of the latter's organization. The order is doubly significant in these respects in view of the fact that prior to this order Yellow had no CCM cabs—all of its cabs were Buick or Yellow Trucking Coach cabs (R. 650).

There was equally swift action respecting Parmelee's management subsidiary. It was organized even in advance of Parmelee's acquisition of the operating companies' stock and, in advance of such

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the interrelationships between CCM's directors, Parmelee's directors, and Sisto partners or associates (*ibid.*).

Markin had purchased 14,000 shares of Parmelee stock at a cost of $301,000 (R. 917) and had been given an option to purchase 25,000 additional shares (Gov. Ex. 7, R. 991-2).

acquisition, Parmelee's directors approved its contract to employ Markin as adviser at $25,000 annually, as well as management contracts between it and Yellow, The Parmelee Company, and Yellow Taxi Corporation, New York.[9]

The three latter contracts were substantially alike except as to the compensation to be paid the management company for its services.[10] The contracts vested in it almost complete managerial powers. They provided *inter alia* that it was to initiate and supervise all purchases of supplies, materials and equipment, and that no such purchase involving more than $500 should be made without consulting in advance with the management company and obtaining its approval or "instructions" from the operating company's board of directors (Gov. Ex. 7, R. 1560, 1566, 1569-70).[11]

The effect of the management contracts was to place control of cab purchases in the hands of those who had something less than an open mind in the matter. Markin, the management adviser, was a

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[9] Gov. Ex. 4, R. 975, 981-2; Gov. Ex. 7, R. 1529, 1548-9, 1559-74. A contract to employ Ernest H. Miller as general manager at $50,000 a year was also approved (Gov. Ex. 7, R. 1546-7, 1549).

[10] The Parmelee Company was to pay $25,000 per year; Yellow and Yellow Taxi Corporation, New York, each agreed to pay $50,000 a year plus a certain portion of its net earnings (Gov. Ex. 7, R. 1562-3, 1567, 1571-3).

[11] Significantly, in 1932 the contract of Yellow (the only operating company in which Parmelee was not a majority stockholder) was amended to tighten the control of the management company by requiring its approval of all purchases over $500, even where the Yellow board of directors authorized them (Gov. Ex. 21, R. 1583).

CCM officer specifically required by his employment contract to promote the sale of CCM cabs. And since CCM had agreed to pay a 5% commission on all orders procured through a sales subsidiary created by Parmelee, that company had a strong interest in compelling the operating companies controlled by it to buy CCM cabs (Gov. Ex. 298, R. 1328-9). Thus in effect Parmelee, through its subsidiaries, occupied the dual position of purchasing agent for operating companies and sales agent for CCM, and received compensation for its "services" from both seller and buyer.[12] Under such circumstances independent decision as to the merit of CCM cabs was impossible.

Further Acquisitions of Control Over Operating Companies

Pittsburgh. In August 1929 Parmelee contracted to purchase all of the stock of Pittsburgh Transportation Co., which was operating approximately 300 cabs in Pittsburgh (Gov. Ex. 32, R. 1038-43).[13] The purchase price was about $400,000 (*id.*, R. 1040). The agreement required the Pittsburgh Company to enter into a contract with Par-

[12] Compare *United States* v. *New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 655 (E.D. Ill.), affirmed, 173 F. 2d 79 (C.A. 7).

[13] While Markin has testified that he did not personally participate in this purchase and that he believed that he had opposed it (R. 921-2), the agreement to purchase Pittsburgh Transportation was signed on behalf of Parmelee by Haveron, a director and officer of CCM (Gov. Ex. 32, R. 1043; Gov. Ex. 33, R. 1048).

melee's management subsidiary upon the terms of the management contracts already imposed on Yellow and other Parmelee-controlled operating companies (*id.*, R. 1042, 1045-8). Significant of the contemporaneous purpose to obtain for CCM a monopoly of sales of cabs to the acquired company is the provision in the purchase agreement that the sellers would not, prior to the closing date, make any unusual commitments for the purchase of cabs without Parmelee's consent, and that "Consent is hereby given to the purchase * * * of approximately 150" CCM cabs (*id.*, R. 1043). The purchase of CCM cabs thus made a part of the agreement of acquisition was duly carried out; among the first actions of the Pittsburgh Company after its change of owners was the purchase of 100 CCM cabs; the next year (1930) it bought 100 more (Gov. Ex. 459, R. 1462).

In the latter half of 1929 Parmelee acquired all the stock of Yellow Cab Company of Pittsburgh at a cost of over $500,000 (Gov. Ex. 39, R. 1051-2). This company also immediately purchased CCM cabs, 148 in 1929 and 133 in the next two years (Gov. Ex. 459, R. 1461).

Parmelee's two Pittsburgh subsidiaries, which were later merged (R. 901), presently operate 485 out of a total of 690 cabs licensed in Pittsburgh (R. 933).

Minneapolis. On December 31, 1930, Parmelee purchased at a receivership sale all of the assets (including 120 cabs) of a Minneapolis taxicab com-

pany (R. 896; Gov. Ex. 48, R. 1067). Markin was the moving spirit in this purchase (R. 895-8). As with the other companies which came under Parmelee's control, substantial purchases of CCM cabs immediately followed. Of the 130 to 140 cabs which the acquired company had at the time of receivership, only ten or twelve were CCM cabs (R. 898), but in its first year of operation as a Parmelee subsidiary it purchased 174 CCM cabs, none from any other manufacturer (Gov. Ex. 459, R. 1461). For many years it has operated about 58% of the cabs licensed in Minneapolis (Gov. Ex. 481, R. 1471).

DeLuxe Cab. In 1929 the DeLuxe Motor Cab Company, owned by Markin, was the third largest cab company in Chicago. It did not itself operate cabs, but it had Chicago city licenses for some 360 cabs which were operated by drivers under an arrangement "whereby the company made a substantial profit on the cost price of the cabs" (Gov. Ex. 40, R. 1053-4). In October 1929 Parmelee decided to buy all of its stock for $388,000 although the company had sustained losses for some time past. The reasons given for the purchase were that it would give Parmelee control of two of the three largest cab companies in Chicago; that DeLuxe was now in a position to buy CCM cabs; and that it was believed that "manufacturing companies and companies not now operating in Chicago" would be glad to pay more for DeLuxe than Parmelee proposed to pay (*id.* R. 1053-4, 1069).

On the same day (February 5, 1930) on which

the purchase agreement for DeLuxe stock was signed (Gov. Ex. 42, R. 1057), CCM and Checker Taxi Company, Chicago's second largest taxicab company, executed an elaborate contract in settlement of protracted litigation between the two (Gov. Ex. 88, R. 1122-34; Gov. Ex. 91, R. 1141). In this contract, which required Checker to purchase only CCM cabs for a period of five years (Gov. Ex. 91. R. 1141), CCM agreed to "cause" *DeLuxe* to contract with CCM, within 30 days thereafter, to purchase no cabs other than CCM cabs for a period of five years from February 5, 1930 (*id.*, R. 1132-3). Thus, although the district court found that "in 1929 neither CCM nor Markin possessed the power to compel Parmelee or any of its affiliates to purchase only CCM cabs" (R. 92), early in 1930 CCM in a most important matter acted on the assumption that it did have this power. DeLuxe did, in fact, enter into a contract with CCM to purchase from it all of its cab requirements (Gov. Ex. 47, R. 1065-6).

Not long after the DeLuxe acquisition, Parmelee's chairman reported to its directors that DeLuxe would not be in a position to show a profit for a considerable period of time and that combining its operations with those of certain independent cab operators in Chicago would be profitable and would "prevent some outside company from entering the taxicab operating field in Chicago" (Gov. Ex. 45, R. 1063-4). A new company, Chicago Cab

Company, was formed to take over both DeLuxe and independent driver-operators (R. 748, 769-70; Gov. Ex. 57, R. 1077). Chicago Cab likewise operated at a loss and in July 1932 arrangements were made, with CCM's consent, to transfer its operations to Checker Taxi Company (Gov. Exs. 53-54, R. 1071-3), which was then controlled by Markin (*infra*, p. 21).

Checker Taxi. Checker Taxi Company was organized in 1919 (R. 745). Its stockholders were individual Chicago cab operators for whom Checker performed various services and charged a service fee (R. 746). By 1929 Checker had 1750 Chicago cab licenses, compared with Yellow's 2350 licenses and 1189 licenses held by "independents" (Gov. Ex. 400, R. 1425).

The Checker drivers began using CCM cabs in 1922 (R. 745-6). But their use was not for long voluntary. In 1925 Checker and CCM entered into a contract, in settlement of litigation between them, which required Checker to purchase CCM cabs (Gov. Ex. 88, R. 1123-4). On suit by CCM for damages caused by breach of this contract, its validity was upheld against the charge that it had been procured by fraud, and on February 5, 1930, Checker and CCM entered into a contract settling the law suit (*ibid.*). The contract required Checker to purchase only CCM cabs for a five-year period, and to buy these cabs from Cab Sales at $2350 a cab (*id.*, R. 1126, 1134; Gov. Ex. 91, R. 1141). On

the date of this contract, CCM made an agreement making Cab Sales its exclusive agent (for sales to Checker) for a five-year period (Gov. Ex. 90, R. 1137). Cab Sales was, under the agreement, to buy cabs outright from CCM at the price of $1900 per cab (*ibid.*).[14]

L'Amoreaux was Cab Sales' sole stockholder until 1931, when Markin, Oakland and Miller purchased 777 of its 1000 shares (R. 808-10).[15] In that year Cab Sales purchased more than 50% of Checker's stock (R. 808). Money to buy the stock was borrowed from Benzoline Motor Fuel Co., a wholly owned subsidiary of Chicago Yellow,[16] and Benzoline, in turn, obtained the $500,000 by borrowing it from Yellow (Gov. Exs. 96-98, R. 1150-2). Checker stock was pledged as security stock for the loan (R. 842). In 1932, in order to finance further purchases of Checker stock by Cab Sales, Waverly Corporation, a wholly owned subsidiary of Yellow,[17] advanced to Cab Sales $200,000 and Waverly obtained $180,000 of the $200,000 from Yellow (Gov. Exs. 101, 103; R. 1158-61, 1165-9).

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[14] Cab Sales was organized as the means of compensating L'Amoreaux, CCM's counsel in the Checker litigation (R. 806-807). As he was Cab Sales' sole stockholder, L'Amoreaux would make a profit of $450 on every cab sold to Checker.

[15] Oakland was first vice-president, treasurer and a director of CCM (R. 802) and also a personal employee of Markin (R. 826). Miller was president of Parmelee, president and general manager of Parmelee's management subsidiary, and a director of both Chicago Yellow and Yellow (Gov. Exs. 7 (R. 987-8), 41 (R. 1055), 140 (R. 1211), 307 (R. 1333)).

[16] Amended complaint, par. 3(b), not denied (R. 34, 76).

[17] Gov. Exs. 206-7, R. 1287.

By stock purchases thus financed by Yellow, Cab Sales procured substantially all of Checker's stock. After Checker came under control of Cab Sales, that company gradually took over both the ownership and operation of Checker cabs as the Checker drivers defaulted on their service charges or on cab purchase payments (R. 749, 752, 778-85). By 1941 all Checker cabs were being operated by Cab Sales (R. 730).

The net result was that Yellow financed a shift in control of its principal competitor, and cemented CCM's monopoly of sales to Chicago cab companies. Control was shifted from a company (Checker) which had been in long and bitter controversy with CCM and which, although a purchaser of CCM cabs, had been so only by reason of contract obligation forced upon it by CCM through litigation. The control was shifted to a company (Cab Sales) controlled by the top executive officers of CCM and Parmelee. Furthermore, the Cab Sales stock soon passed solely into Markin's hands. In 1932 he took over Miller's stock in Cab Sales and in 1933 L'Amoreaux's stock as well (R. 809). By the end of 1934 he owned substantially all of its stock (Gov. Ex. 134, R. 1208). Markin, it will be recalled, was obligated by his contract of employment with CCM to use his best efforts to procure sales of that company's product (*supra*, p. 12).

As early as May 1931, Markin was able to report to CCM's board of directors that "interests friendly

to this corporation had acquired a controlling interest in" the stock of Checker and that in view of the change in the control of Checker, it might be advisable to arrange for satisfaction of CCM's judgment against Checker (Gov. Ex. 99, R. 1154-5).

When Samuels, who was vice president of Yellow and president of Chicago Yellow, testified as to the reasons for their loans to finance Cab Sales' purchases of Checker stock, he said that the companies felt that the effect of the transaction would be that "our competitor would feel a sort of friendly interest in us rather than an antagonistic interest" (R. 843). When asked why Yellow did not consider buying Checker outright, his answer was, "Because the cry has always been monopoly and *we were opposed to its ourselves*" (*ibid.*). The opposition, it is plain, was to exposure of monopoly, not to its actuality.[18]

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[18] If Samuels' testimony is to be believed, he was unaware at the time of the first loan that the owners of the company whose entry into the cab business was to be financed by Yellow were the persons who were also effectively controlling CCM, Parmelee, Chicago Yellow and Yellow itself (R. 855). But Yellow's management advisers were not equally in the dark. Samuels testified that the matter was discussed with Miller in his capacity as adviser to *Yellow*, and that Miller "suggested it would be a good thing for the industry and a good thing for Chicago Yellow and Yellow, which had a lot of money which was not being invested" (R. 857). Miller was Parmelee's president and one of the insiders who were about to buy Cab Sales (*supra*, p. 20).

CCM's Acquisition of Direct Stock Control of Parmelee

In October 1930 three of the appellees entered into a deal which insured CCM's power to control taxicab purchases, expanded Parmelee's operating cab company empire, and substantially increased Markin's holdings in CCM. Formally there were two transactions: (1) Markin traded all the stock of Motor Cab Transportation Co. (which controlled subsidiaries operating 2050 cabs in New York) to CCM for CCM common stock;[19] and (2) CCM traded to Parmelee all the stock of Motor Cab, all of Parmelee's $1,000,000 par value preferred stock, $1,442,000 of its debentures, and options on its common, for 422,787 shares of newly issued Parmelee common (Gov. Exs. 61-62, R. 1080-8; Gov. Ex. 64, R. 1093-6). In substance there was one transaction by which Parmelee got Motor Cab (plus its own securities and options on its common), Markin got 58,447 shares of CCM stock, and CCM got a majority interest in Parmelee.[20]

There can be no dispute that CCM acquired by

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[19] Although the agreement for this exchange was between Markin and L'Amoreaux, on the one hand, and CCM on the other (Gov. Ex. 62, R. 1085-8), all of the CCM stock issued in exchange for Motor Cab stock went to Markin (Def. Ex. 7, R. 1611).

[20] Following the new issue of Parmelee common, it had 721,905 shares outstanding (Def. Ex. 8, R. 1611). The 422,787 shares received by CCM, plus 23,000 purchased from Sisto shortly before (Gov. Ex. 64, R. 1094), gave CCM 445,787 shares, or 61.75% (Gov. Ex. 139, R. 1210). CCM has continued to own 61.75% of Parmelee's stock (R. 94; Def. Ex. 8, R. 1611).

this transaction the power to control Parmelee and Parmelee's operating subsidiaries. The crucial question is whether CCM's purchase of a controlling interest in Parmelee was, as we contend, a calculated purchase for control in order to assure maintenance of captive outlets for CCM cabs or whether the control was a mere by-product of investment by CCM in a business which CCM believed would be profitable.

The contemporaneous official documents of the parties are silent as to any investment consideration. They make pointed reference, on the other hand, to the control of Parmelee which the deal would assure. When purchase of Parmelee stock came before the CCM stockholders for approval, it was resolved that acquisition of "a controlling interest" in Parmelee be approved (Gov. Ex. 64, R. 1096). At the Parmelee directors' meeting which approved the plan, its president described the plan as the product of negotiations "looking towards a closer affiliation" of CCM and Parmelee (Gov. Ex. 61, R. 1080). Nor was CCM slow to exercise control. Within six days after its stockholders approved the acquisition on September 25, 1930 (Gov. Ex. 64, R. 1093-4), Markin and L'Amoreaux were added to the Parmelee board of directors and Markin was made chairman of the board, and on October 16th an executive committee consisting of Markin, L'Amoreaux and Miller was appointed (Gov. Exs. 65(R. 1098), 66(R. 1103)). On Novem-

ber 1st "closer affiliation" was completed when Miller was placed on the CCM board (Gov. Ex. 223 (not printed), R. 1290).

The surrounding circumstances tell the story even more clearly. We have seen that Parmelee, from its inception, had used its control over operating companies to cause them to purchase CCM cabs. We have also seen the firm foundations on which such action by Parmelee for the benefit of CCM rested—the companies' interlocking directors, Markin's position as president of one and special adviser to the management subsidiary of the other, Markin's and CCM's stock interest in Parmelee, and, above all, Sisto's major interest in both companies.

But by September 1930 Sisto had passed out of the picture and there was more than a possibility that this development would destroy the existing relationship so profitable to CCM. Sisto was in financial difficulties following the stock market crash in October 1929, and in July 1930, shortly before Sisto's liquidation, CCM bought from it for more than $1,250,000, Sisto's entire holdings of Parmelee debentures, 23,000 shares of Parmelee common, and an option on 93,445 additional shares of common (R. 810, 927; Gov. Ex. 64, R. 1093-1094; Gov. Ex. 68, R. 1107).

The measure of the importance placed by CCM upon obtaining stock control of Parmelee is what CCM was willing to pay to get control. At the time of Parmelee's organization in April 1929,

time of Parmelee's organization in April 1929, when there were many links binding it to CCM, CCM's directors had been unwilling to purchase Parmelee common and insisted upon confining the CCM investment to a senior Parmelee security—debentures or preferred stock (R. 918). This stands in contrast with their action in September 1930 when CCM surrendered its creditor and preferred stock position in Parmelee, in exchange for a common stock equity giving CCM outright stock control. At that time Parmelee "did not have any money" (R. 928), it was in need of additional working capital (Gov. Ex. 61, R. 1081), and Markin was himself unwilling to exchange his Motor Cab stock for Parmelee stock (R. 926). Plainly there was no element of prudent investment in this surrender of senior securities, plus Motor Cab stock, for a controlling stock interest in Parmelee;[21] rather, it was "deliberate, calculated purchase for control." CCM took a grave financial risk in order to assure that it could continue to monopolize the cab purchases of the Parmelee-controlled operating companies and prevent them from purchasing cabs in a free competitive market.[22]

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[21] CCM itself claimed that it sustained a loss of $1,157,266 on the transaction (Gov. Ex. 67, R. 1106).

[22] In this connection appellees have sought to prove that it was not Markin but a stockholder group represented by John J. Raskob which engineered the deal (R. 925-926, 928). It seems elementary that CCM, the corporate entity, is responsible for its acts, whoever may have procured them. In any event Markin appears to have consented to the transactions in his personal capacity as owner of Motor Cab, and, in his official capacity as president of CCM, he made the

Compulsion upon Controlled Operating Companies to Purchase CCM Cabs

The extent to which CCM's welfare depends upon control of the operating companies is strikingly shown by the statistics on its sales since January 1, 1929. Of 29,260 cabs sold, 16,996 were sold to the operating companies here involved and only 12,264 to outside companies (Def. Ex. 13, R. 1628). Since 1945 CCM has not even troubled to maintain a sales organization except in New York City and at the factory (R. 828).

The cab purchase record of the Parmelee and Markin companies is revealing. The following table shows their purchases of CCM cabs and those of other cabs from 1929-1941:[23]

	CCM	*Other*
Yellow	6301	—
Yellow Cab of Minneapolis	417	2
Pittsburgh subsidiaries	1276	5
National Transportation Inc.[24]	6998	—
Parmelee (limousines and trucks 1929-1939)	110	—
Cab Sales	2439	—

Both the importance of the operating companies

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offer to Parmelee which resulted in CCM's acquisition of Parmelee control (Gov. Ex. 61, R. 1084, 1088).

[23] R. 790; Gov. Exs. 452-460, R. 1457-63. The years 1929-1941 are selected for the purposes of the above table because between 1942 and 1947 CCM was engaged in war production and reconversion from war production and sold no cabs (R. 95).

[24] National is now Parmelee's only New York subsidiary; it operates 1932 cabs (R. 802). In computing National's pur-

in the CCM scheme and the confidence that Markin felt in his ability to control them are reflected in a syndicate agreement, executed August 10, 1933, between Markin and the Cord Corporation (Gov. Ex. 485, R. 1472). When the Raskob interests ousted Markin on August 1, 1933, he turned to Cord for financial aid in exercising an option he held on a block of 58,837 shares of CCM common stock (*ibid.*). The syndicate agreement was the result. It gave Cord a majority on the CCM Board, but this was evidently not deemed enough fully to protect Cord's stake in CCM. For the agreement also provided (*id.*, R. 1473):

> that, if Cord Corporation so requests at any time, he [Markin] will to the fullest extent of his ability cooperate in every possible way to put representatives of Cord Corporation *in control of Parmelee Transportation Company, Chicago Yellow Cab Company, Inc., Checker Taxi Company, The Waverly Corporation, Cab Sales & Parts Corporation and The Transportation Management Corporation.* [Emphasis added.]

In the case of those operating companies which were directly or indirectly owned by Markin or Parmelee there has been no problem of maintaining control for the benefit of CCM.[25] Markin's in-

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chases of CCM cabs, we have included 1823 cabs purchased from "affiliated companies" (Gov. Ex. 459, R. 1463).

[25] These include the New York companies, the Pittsburgh Company, the Minneapolis Company, Cab Sales and Checker. (After Checker ceased to function as an operating company it was sold (in 1942) to a group of Markin's associates (Gov. Ex. 132, R. 1206)).

terest in CCM welfare was always assured by his substantial stock holdings,[26] by his position as president and chief executive officer of CCM, and by his employment contract. As to Parmelee, CCM has owned a majority of its stock since October 1930.

The record reveals but one instance in which Parmelee even proposed action inimical to CCM's interests. During the 12-day period (August 2-14, 1933) in which Markin was ousted from the presidency of CCM (R. 411, 610-1), Parmelee's chairman recommended acceptance of an offer by Yellow to purchase Parmelee's entire stock interest in Chicago Yellow, Yellow's 100% parent (Gov. Ex. 167, R. 1237-8). After he had stated that Parmelee "was in great need of working capital" and that the sale "presented an advantageous solution to its difficulties," the directors approved the sale (*ibid.*). CCM's lawyers gave notice that CCM would, as majority stockholder of Parmelee, bring action to enjoin or set aside the sale if it should be made (Gov. Ex. 484, R. 1471-2), and this action effectively blocked the sale (Gov. Exs. 166 (R. 1236-7), 172 (R. 1240-1), 173 (R. 1243)).

In the case of Yellow the problem of control was somewhat more complicated because the conspirators have generally held less than a majority interest in Yellow's parent, Chicago Yellow. Never-

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[26] As of January 1, 1929 Markin owned 14.9% of the CCM stock; by March 1938 he had over 45% of CCM's stock and he appears to have owned at least this percentage of CCM's stock ever since then (Def. Ex. 7, R. 1611).

theless control has been maintained, as a practical matter, from the foundation of Parmelee. We have seen how Yellow's initial order for CCM cabs was planned by the conspirators and how the management contract was imposed on it (*supra*, pp. 11, 13-14). In 1932 when a supplier apparently questioned Yellow's credit, Oakland, as vice president and treasurer of CCM, wrote, "The Yellow Cab Company of Chicago is controlled by the Parmelee Transportation Company, which, in turn, is controlled by" CCM (Gov. Ex. 142, R. 1212). At about the same time the Parmelee directors authorized the deposit of its Chicago Yellow stock "in a voting trust, or otherwise to preserve the equity *control* of this Corporation in said Chicago Yellow" (Gov. Ex. 74, R. 1112; emphasis supplied).

Markin and other CCM officials repeatedly exercised their control over Yellow in minor as well as major matters. The record reflects an almost uniform pattern of domination (see, *e. g.* Gov. Exs. 273-297 (R. 1318-1327), 328 (R. 1346), 336-351 (R. 1351-5), 355 (R. 1358)).

The isolated instances of nascent rebellion against Parmelee control only serve to show the firmness with which that control was maintained. In 1934 Fulton, a director of Yellow and Chicago Yellow, criticized Parmelee's influence and suggested an investigation of the use of smaller cars (rather than purpose-built CCM cabs) by Yellow (Gov. Exs. 175-176, R. 1244-5). Markin promptly demanded that Fulton be replaced as a director

(Gov. Ex. 179, R. 1247-1248). Samuels, to whom the demand was addressed, was shocked. He thought that the ground upon which the proposed change in directors was nominally to be made (to give Parmelee more representation) was ridiculous. Samuels wrote (Gov. Ex. 182, R. 1251):

> Please bear in mind that these three men [Fulton and two others] were placed upon this Board by Parmelee and that I and every other member of this Board was placed here by Parmelee. It * * * seems a direct slap in the face at me * * * that Parmelee * * * decides that three members of the Board are unfit to act as directors and watch the interests of Parmelee * * *.

At the same time that the director issue was being debated, the purchase of 1000 new cabs was being discussed. On March 27, 1935, Chicago Yellow wrote Markin a letter discussing the director question, the cab purchase matter, and various other questions (Gov. Ex. 185, R. 1256). The letter was defiant in tone and could only be interpreted as a declaration of independence. There was included a flat refusal to remove Fulton unless "just cause" could be shown (*id.*, R. 1257). With respect to the proposal that Yellow buy 1000 new CCM cabs, serious objection was made to committing Yellow to such a major act without the opportunity to test the cabs out. Markin was presented with an ultimatum (*id.*, R. 1258):

> In view of the fact that [CCM] * * * has not made any cabs during the past year, we are unable to judge the merits of the product which it now proposes to furnish * * *. We are of the opinion that in spending approximately $1,350,000. of the stockholders' money, we should be furnished with six cabs of the type which you propose to sell this corporation, and be permitted to use these cabs for a sufficient length of time to enable us to find any defects which may develop. We will assure you that if, after testing the six samples submitted by you, and after the correction by Checker of any defects which may appear at no additional cost to us, the officers of Yellow Cab Company will recommend to the Board that an order be placed with you for 1000 cabs, provided that these cabs are still the most satisfactory of those submitted to the company.

Moreover the Yellow officers insisted upon a written guaranty with reference to prices of replacement parts, and stated (*ibid.*):

> This guaranty forms a part of the transaction and it will be impossible to place the order with you unless Yellow and [CCM] * * * can come to some agreement in reference to replacement parts * * *.

This was brave talk. But something must have occurred to melt such defiance. The very next day the directors of Yellow unanimously approved the purchase of 1000 cabs after a general

discussion reflecting how poor the cabs of other manufacturers were and how satisfactory had been the experience with CCM cabs (Gov. Ex. 186, R. 1259-60). There was no mention of the conditions precedent to purchase of CCM cabs insisted upon in the report of the preceding day.[27] Mr. Markin, although not a director of Yellow was present at the meeting (*id.*, R. 1259). At all other times the doubts of Yellow officers as to the merits of CCM cabs were expressed only privately (*e. g.* Gov. Ex. 177, R. 1246; Gov. Ex. 326, R. 1345). And the resignation of Fulton, the offending director,[28] from the Chicago Yellow Board was arranged (Gov. Exs. 192-193, R. 1264-6).

It would seem to serve no useful purpose, and unduly to prolong this brief, to detail the intricate intercompany financial deals and stock purchases which were used to assure that Chicago Yellow was controlled by interests friendly to CCM. They included extensive stock purchases by Yellow of its parent's stock and the placing of that stock in the Waverly Corporation with the voting stock controlled by Markin and Yellow (R. 626-7; Gov. Exs. 147, 148, R. 1217-8, Gov. Exs. 205-209, R. 1284-8). It suffices here that effective control was main-

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[27] It is difficult to reconcile these events with Samuels' testimony that he always acted independently as a director of Yellow and Chicago Yellow (R. 886-887) and that Markin "didn't have anything to do with the running of our company" (R. 869).

[28] Another offending director (Keller) accepted retirement gracefully but took occasion to state that "there has been nothing whatever said or done on my part to oppose * * * Mr. Markin's wishes * * * ." (Gov. Ex. 192, R. 1264).

tained. Yellow had no CCM cabs before the conspiracy commenced in 1929 (*supra*, p. 13). In the period 1929-1941 it bought 6301 CCM cabs, none from any other manufacturer (*supra*, p. 27). From 1941 to February 1946, all of the 176 cabs which it purchased (with possibly one exception) were used CCM cabs (R. 657, Gov. Exs. 452-453, R. 1457-8). In August 1945 it placed an order with CCM for 1595 cabs, but when that company was unable to fill the order Yellow turned to other sources, and obtained 1,137 non-CCM cabs during the period March 1946-August 1947 (R. 660, 668; Gov. Ex. 335, R. 1350; Gov. Exs. 452-453, R. 1457-8).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In entering a final decree dismissing the plaintiff's amended complaint.

2. In holding that the evidence does not establish the unlawful combination and conspiracy in restraint of interstate commerce charged in the amended complaint.

3. In finding that in 1929 none of the defendants formed an intent or plan to control commerce in the sales of cabs in any city or place.

4. In finding that in 1929 none of the defendants formed an intent or plan to compel Parmelee or any of its cab operating affiliates to purchase only CCM cabs.

5. In finding that in 1929 neither CCM nor Markin possessed the power to compel Parmelee or any of its cab operating affiliates to purchase only CCM cabs.

6. In finding that CCM recognized that Markin was acting in his personal capacity when, in connection with Parmelee's organization, he entered into an employment contract with Transportation Management Corporation, a wholly owned subsidiary of Parmelee.

7. In concluding that the stock relationships which developed among the defendants were not part of a design to compel the purchase of CCM cabs; were not accompanied by an intent to control commerce in the sale of cabs to the leading cab companies in Chicago, New York City, Pittsburgh, or Minneapolis; and were occasioned by other business factors.

8. In finding that the transactions during the latter part of 1930 whereby Markin transferred to CCM all of his stock in Motor Cab Transportation Corporation in exchange for stock of CCM, and CCM transferred to Parmelee such Motor Cab stock plus all of CCM's holdings of Parmelee debentures and preferred stock in exchange for 422,787 shares of Parmelee common stock, were not related to any sales of CCM cabs to Parmelee or to any of its cab operating affiliates, and were not accompanied by any intent or plan on the part of any defendant respecting control over commerce in the sales of cabs.

9. In finding that it was the business judgment of Checker, Yellow, and the operating subsidiaries of Parmelee during the years 1929 to 1942, inclusive, that the CCM purpose-built cab better served their needs than converted pleasure cars and in implying thereby that their purchases of CCM cabs resulted from exercise of business judgment rather than from extraneous factors.

10. In making no findings as to most of the facts, established by undisputed documentary evidence, on which the plaintiff relied.

11. In concluding that absence of direct stock control of Parmelee by CCM or Markin, or by both together, at the time of Parmelee's organization in April 1929 and shortly thereafter, established that the defendants were not then, or at any time thereafter, parties to a combination and conspiracy to acquire control over operating cab companies for the purpose and with the effect of restraining and monopolizing their interstate purchase of cabs.

SUMMARY OF ARGUMENT

I. Commencing in 1929 and continuing down to the present time, there has been a conspiracy among the appellees for the acquisition and maintenance of control of the leading taxicab companies operating in New York City, Chicago, Pittsburgh and Minneapolis. A principal purpose and effect of the conspiracy has been to cause the operating companies to obtain their taxicab requirements from appellee CCM to the exclusion of all other cab manu-

facturers. Contrary findings of the trial court are in disregard of overwhelming, undisputed documentary evidence.

II. The decision by this Court on the prior appeal in this case (*United States* v. *Yellow Cab Co.*, 332 U.S. 218) controls the legal issues. It was there held (1) that the sale of replacements for some 5000 taxicabs constitutes an appreciable segment of interstate commerce, protected by the Sherman Act against unreasonable restraint or monopolization; (2) that a combination to acquire control over the companies which operate the 5,000 cabs, with the purpose of excluding manufacturers other than CCM from the opportunity to sell cabs to them, is an unreasonable restraint of commerce condemned by the Act; and (3) that such common ownership or control of the corporate appellees as resulted from their conspiracy was impotent to liberate it from the ban of the Act.

The subsequent decision in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, does not overrule or modify the law as thus declared, but rather reaffirms it. While upholding the acquisition by a steel company of the assets of a fabricator against the contention that the resulting vertical integration was illegal *per se*, this Court explicitly distinguished the offenses charged in the present case as involving a combination with the purpose and intent of restraining commerce, and reaffirmed the holding that the existence of vertical integration cannot insulate such conduct from the antitrust

laws. In any event there is here no real integration either of ownership or operation, but simply the existence of stock control by a manufacturer (CCM) and its president (Markin) of the ultimate consumers of the manufacturer's products—the taxicab operating companies.

ARGUMENT

I

Appellees Have Engaged in a Conspiracy Unreasonably to Restrain and Monopolize Interstate Trade by Acquiring Control Over the Principal Taxicab Operating Companies in Certain Leading Cities and Causing These Companies to Purchase Their Taxicabs Exclusively from Appellee CCM

The evidence leaves no room for dispute that CCM and Markin have acquired control of the cab operating companies here involved. Markin is sole owner of Cab Sales; CCM owns a majority interest in Parmelee which in turn owns all the stock of National Transportation, Inc., Yellow Cab of Pittsburgh, and Yellow Taxi Company of Minneapolis (R. 90, 94). And Parmelee has effectively controlled Yellow through its ownership of Chicago Yellow stock and other means (supra, pp. 29-34). The record also affirmatively shows by contemporaneous statements of the parties that the control so acquired was part of a deliberate, calculated scheme to assure a protected market for CCM cabs by excluding other manufacturers from sales to the controlled operating companies. The probative facts stated in the opinion of the court below (which embodies its only

findings) are not at variance with those we have set forth. But a number of findings of ultimate fact which we have assigned as error (Assignments 4, 5, 6, 8, 10, 11, 14, 17, 18, R. 106-7) cannot, it is submitted, stand in the face of contrary evidence which the court apparently overlooked or failed properly to appraise.[29]

a. *Markin's capacity in planning the formation of Parmelee*

The trial judge found that "in connection with Parmelee's formation and the preceding negotiations Markin, aside from discussions concerning CCM's purchase of Parmelee's preferred shares, acted in his personal capacity" (R. 91).

This finding appears to be predicated upon a misapprehension of the nature of the offenses alleged. The appellees are charged with a combination and conspiracy to restrain trade in the sale of cabs (R. 40-41). It makes no material difference whether one or another of them performed a particular act in furtherance of the conspiracy so long as all were parties to it. If the evidence of the participation of CCM in the conspiracy were limited to Markin's acts in the formation of Parmelee, the question whether he was acting for CCM or personally might become relevant. But the evidence is not so limited. CCM engaged in a series of transactions directly in aid of the combination. Its 1929 $1,000,000 invest-

[29] Since some of the erroneous findings are redundant, we do not discuss each one separately. But we believe that the

ment in Parmelee was made because its board of directors was of the opinion that Parmelee's acquisition of operating companies—immediate and future—would be beneficial to CCM (*supra*, pp. 10-12). A major link in the whole combination was forged by its acquisition in 1930 of a majority of Parmelee stock, at the sacrifice of CCM's creditor position (*supra*, pp. 23-26). Further evidence, were it needed, is furnished by CCM's loan to Parmelee to permit repurchase of Chicago Yellow stock and thus maintenance of control over Yellow (Gov. Exs. 170-172, R. 1239-41).

Quite apart from the materiality of the above finding, it cannot be reconciled with the evidence. It is true that Markin's purchase of Parmelee stock gave him a personal interest in Parmelee. But Markin, throughout the time when he was actively promoting the formation of Parmelee, was CCM's president and general manager and bound by contract to devote all his time and attention to the business of CCM. To conclude that Markin was thus acting only in his personal capacity is to ignore his official reports to CCM's directors and stockholders in which he stated that he had been working on a plan by which CCM "might obtain a sustained production by insuring recurring orders from large operating companies," that the contemplated plan was "essentially for the benefit of" CCM, and that

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evidence set forth in the Statement, plus that referred to in the findings which we discuss, refutes all of the findings herein specified as error.

CCM's purchase of Parmelee preferred stock, an integral part of the plan, would be "extremely advantageous" to CCM in connection with marketing its product (*supra*, pp. 10-12). Either these contemporaneous statements were false or Markin, in his promotion of the Parmelee plan, was not engaged in a purely personal venture.

When CCM modified Markin's exclusive employment contract so as to permit him to act as an adviser, for pay, to Parmelee's management subsidiary, the condition which was attached to this authorization was that he continue to "devote his efforts towards promoting the sales" of CCM cabs (*supra*, p. 12). When CCM thus modified its contract with Markin, it in effect declared that it believed that Markin, in acting as adviser to Parmelee's subsidiary, would be promoting the business and interests of CCM. We submit that the court below was plainly in error when it concluded that CCM modified Markin's employment contract because it recognized that he would be "acting in his personal capacity" in serving as adviser to Parmelee's management subsidiary (R. 92).

b. *The intent or plan of the appellees*

The trial court found that "in 1929 neither CCM, Markin nor any of the defendants formed an intent or plan to control commerce in the sale of cabs in any city or place" (R. 92-93).

This finding is flatly contradicted by evidence

showing beyond doubt that a principal purpose of the formation of Parmelee was to secure control of cab operating companies and thereby to assure a captive market for CCM cabs. Markin's motives are made clear in his statements to the CCM Board, and his testimony as to his conversations with Miller indicating that the sale of CCM cabs was a prime consideration (*supra*, p. 9). Since CCM is a corporation, its intentions must be found in the words and acts of its officers, directors and stockholders. Fortunately their contemporaneous words and acts are spread forth on the corporation's records (*supra*, pp. 9-13). In particular, the formal resolution of the CCM Board on the occasion of its initial investment in Parmelee makes its intentions plain (Gov. Ex. 2, R. 971):

> WHEREAS, in the opinion of this Board of Directors the acquisition by Parmelee Transportation Company of a substantial interest in the stocks of Yellow Taxi Corporation, New York, of Chicago Yellow Cab Company, Inc., and of The Parmelee Company and the possible future acquisition of interests in other operating companies, will be of substantial benefit to this Company; and
>
> WHEREAS, certain of the stockholders, directors and officers of this Company are prepared to assist in the financing of the Parmelee Company; * * *

And Sisto & Co., the then controlling stockholder of CCM, financed Parmelee and has been credited by Markin with having insisted upon the CCM and

Markin investments in Parmelee, as well as the employment of Markin as an "adviser" to the new enterprise (R. 917).

To reach its conclusion that there was no "intent or plan" to control commerce in the sale of cabs the trial court had to ignore all this evidence. Instead of viewing the conspiracy as a whole (see *United States* v. *Patten*, 226 U. S. 525, 544), it appears to have viewed each of the myriad of transactions in this record as though it were wholly separate from and unrelated to any of the other transactions. Thus in viewing Markin's actions in the forming of Parmelee, the court below tried to divorce them from the fact that Markin was and is President, General Manager, a substantial stockholder and a director of CCM. In looking at Parmelee's actions in acquiring cab operating companies, the trial court disregarded the purposes of Parmelee's formation, the composition of its board of directors, and the interest of its founders in CCM. The court noted (R. 92) that Yellow commenced purchasing CCM cabs after the formation of Parmelee, but failed to find any connection between the two events despite the fact that the initial sale of 1000 CCM cabs to Yellow was a part of the plan for the formation of Parmelee as reported by Markin to the CCM Board. Only by such an artificial compartmentalization of the evidence could the court below escape the irresistible inference that there was formed in 1929 a deliberate plan to obtain control of cab operating companies and to compel them to purchase CCM cabs.

c. CCM's power over Parmelee and its affiliates in 1929

The trial court found that "in 1929 neither CCM nor Markin possessed the power to compel Parmelee or any of its affiliates to purchase only CCM cabs" (R. 92).

At the outset it should be noted that even if the above finding were supported by the evidence it would not establish a defense to this action. Lack of power to carry out a conspiracy is no defense under the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. Indeed, conspiracies under the Act "are not dependent on any overt act other than the act of conspiring" (*ibid.*). Moreover, Parmelee is a defendant in this suit and a party to the conspiracy; it is not necessary to show that the other conspirators could force Parmelee to perform its part in the conspiracy or even that there was an express agreement by Parmelee to do so. A conspiracy may rest upon an informal understanding as well as upon a formal agreement. *Direct Sales, Inc.* v. *United States*, 319 U. S. 703. It is enough that CCM, Markin, Parmelee and the other appellees acted in concert in furtherance of the common plan; no showing that adherence was compelled is necessary. *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 62.

The finding, however, cannot be squared with the evidence. It can rest only on the assumption that the failure of Markin and CCM to possess a ma-

jority of the voting stock of Parmelee conclusively negatives control. But that assumption fails to take into account the realities of the situation. Parmelee was not, after all, organized merely as a holding company for taxicab operating companies. It was organized pursuant to a specific plan worked out by Markin, Miller, CCM, and Sisto & Co. which contemplated the sale of CCM cabs. The conspirators installed the first management of Parmelee and that management was clearly aware of its mandate. Miller was given the Parmelee presidency; two members of CCM's Board were placed on the Parmelee Board; and Markin was hired as "adviser" to Parmelee's management subsidiary. Sisto (which then dominated CCM's Board), CCM and Markin all became substantial stockholders of Parmelee.[30] Parmelee was actually organized by Sisto and the early meetings of its directors were held in Sisto's office.[31] One of its first corporate acts was to approve without modification the elaborate plan presented to it for the acquisition of cab operating companies.

It can scarcely be argued at this late date that control of a corporation can only be secured by a majority of the voting stock. A cohesive minority can and frequently does secure control regardless of the wishes of a disorganized or indifferent ma-

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[30] The trial judge laid great stress upon the fact that CMM refused to buy common stock, and instead took non-voting preferred (R. 98) but disregarded the fact that the preferred was convertible into common (Gov. Ex. 6, R. 1520).

[31] R. 919-920; Gov. Ex. 4, R. 975, Gov. Ex. 5, R. 982; Gov. Ex. 6, R. 984; Gov. Ex. 7, R. 987.

jority. As pointed out in *Detroit Edison Co.* v. *S. E. C.*, 119 F. 2d 730, 739 (C. A. 6), certiorari denied, 314 U. S. 618, "Ownership of corporate shares without appreciable corporate control and control of corporate wealth without appreciable ownership has become a natural phenomenon of our economic system."[12] In this case, there can be no question but that CCM and Markin had *de facto* control of Parmelee despite their lack of direct voting control during Parmelee's first year of existence.

d. *The motives for the acquisition by CCM of stock control of Parmelee*

The trial judge found that the three-way transaction by which Markin received CCM stock, Parmelee acquired Motor Cab Transportation Co., and CCM obtained a majority of Parmelee stock (see Statement, *supra*, p. 23) "was not related to any sales of CCM cabs to Parmelee or any of its taxicab operating affiliates and no accompanying intent or plan connected with any control over commerce in the sales of cabs existed" (R. 94).

On its face this transaction appears to be one in furtherance of the original conspiracy to control cab operating companies. When Parmelee was organized CCM's investment in it was explicitly made in anticipation of "the possible fu-

[12] Compare *American Gas & Electric Co.* v. *S.E.C.*, 134 F. 2d 633 (C.A. D.C.), certiorari denied, 319 U.S. 763. And see Public Utility Holding Company Act of 1935, § 2(a) (7), 15 U.S.C. 79b (7); Investment Company Act of 1940, § 2(a) (9), 54 Stat. 791-792, 15 U.S.C. 80a-2(a) (9).

ture acquisition of interests in other operating companies" (Gov. Ex. 2, R. 971). The Motor Cab transaction furthered that end and, at the same time, gave to CCM an outright majority stock interest in Parmelee which would assure that the operating companies controlled by Parmelee would remain loyal CCM customers. Although Parmelee had been subject to CCM's practical control from the beginning, this transaction made such control not only direct but permanent. As has been pointed out, (*supra*, p. 25), the collapse of Sisto eliminated it as a factor in common ownership and control of CCM and Parmelee, and created a situation making direct stock control of Parmelee important to CCM.

Certainly the vesting in CCM of control over Parmelee was uppermost in the minds of the parties to this transaction. The CCM stockholders' resolution approved "the acquisition of a controlling interest in Parmelee" (Gov. Ex. 64, R. 1096). The President of Parmelee described the transaction to the Parmelee Board as the result of "negotiations * * * looking toward a closer affiliation of these two companies" (Gov. Ex. 61, R. 1080). Quite apart from these contemporaneous characterizations of the transaction, the history of CCM's relation to Parmelee must be considered. The advantage to CCM from sales to Parmelee-controlled companies had been a principal factor both in Parmelee's formation and CCM's initial investment in it, and this contemplated advantage had become a reality through immediate substantial orders

for CCM cabs. A finding that this acquisition by CCM of control of Parmelee was "not related" to cab sales could, in these circumstances, be made only if there were convincing evidence of other overriding business reasons for the transaction. But there was none.

The trial court gave a plausible reason for Parmelee's participation in the transaction—its desire to ease its financial strain by retiring the $1,442,000 of debentures and $1,000,000 in preferred stock then held by CCM. But we are here concerned with CCM's motives. CCM traded these senior securities in Parmelee for common stock at a time when that company was in an extremely precarious financial condition (*supra*, p. 26; R. 810, 927). The court suggested no business reason why CCM was willing to enter such a disadvantageous arrangement, and none can well be imagined except a desire to maintain control of Parmelee for the profit of CCM.

The trial judge stressed a number of other considerations (R. 93), none of which adequately explains CCM's action. It noted that the then controlling stockholders, the Raskob-duPont group, wished Markin to get rid of Motor Cab Transportation Company so as to remove him from competition with CCM customers in New York City. But this does not explain why the Raskob-duPont group suggested Parmelee as the prospective buyer when Parmelee had no cash (R. 812), and Markin was unwilling to accept Parmelee stock. Nor does it

explain how it would relieve CCM of embarrassment to have its New York customers competing with companies owned by Parmelee rather than Markin, since the major ownership in Parmelee was to pass to CCM.[33]

The crux of the matter is thus exposed. To accept the trial court's finding it is necessary to accept the hypothesis that CCM (or the Raskob-duPont group controlling it) was so anxious to get Markin out of Motor Cab that it was willing for that reason alone to give Markin a large block of CCM stock and surrender CCM's creditor position in Parmelee in exchange for Parmelee common of extremely doubtful value. And it is necessary to conclude that CCM was by 1930 no longer motivated by the desire for a controlled cab market which had led it to invest $1,000,000 in Parmelee in 1929.

If the trial court's hypothesis is rejected, as we think it must be, the inescapable conclusion is that the transaction was what it appeared on its face to be—a method of assuring CCM's control over cab purchases by securing to CCM the majority of Parmelee stock, and at the same time adding Motor Cab to the Parmelee stable of controlled operating companies. It was nothing more nor less than a " 'deliberate, calculated purchase for con-

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[33] In this connection it is interesting to note that Markin and his associates acquired control of Checker the following year, although Checker was also competing with a CCM customer—Yellow (*supra*, p. 20).

trol.'" *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228; *United States* v. *Reading Co.*, 253 U. S. 26, 57.

c. *The compulsion exerted upon the operating companies to buy CCM cabs*

The trial judge found that "the proof [does not] show that the purchases of CCM's purpose-built cabs were made under compulsion" (R. 99).

As was the case with the other findings here reviewed, we think the trial judge was able to reach this finding only by disregarding conclusive evidence to the contrary. The trial judge relied upon testimony by officers of the appellees indicating that CCM cabs have received acclaim, that CCM has been the only manufacturer continuously making purpose built cabs since 1929, and that operating companies usually replace their fleets with cabs of the same manufacture. These considerations might explain an independent decision by an operating company to buy CCM cabs if such a decision were possible. But they do not explain the dramatic coincidence of the acquisition of control by Parmelee of Yellow and the Pittsburgh companies with the decision of those companies to shift to CCM cabs (*supra*, pp. 13, 16). Nor do they explain the decision of the Minneapolis Parmelee subsidiary, immediately after its formation, to replace its largely non-CCM fleet with CCM cabs. (*supra*, p. 17). These sudden shifts to CCM cabs are not only contrary to the usual practice, as found

by the trial court (R. 99), of sticking to one manufacturer but in their timing are manifestly indicative of control and compulsion.

Perhaps the most striking example of the exertion of the power to compel cab purchases is found in Yellow's initial order for 1000 cabs from CCM. As has been pointed out, this order was part of the plan for the organization of Parmelee. Even prior to its organization, the conspirators were able to give CCM assurance of an order for 1000 cabs, an order which materialized immediately after Parmelee was formed (*supra*, pp. 11, 13). The inference of compulsion is strong. If there were no compulsion, the appellees could presumably produce evidence to show that the purchase was in fact an independent act. The record is bare of such evidence.[34]

This is not the only instance of Yellow's subjection to outside pressure. There were also the 1934 director rebellion which led to the replacement of two Chicago Yellow directors on Markin's personal demand, and the ultimatum by Yellow officers to Markin which specified the conditions on which CCM cabs would be considered, followed by their complete capitulation on the following day (*supra*, pp. 30-33).

Each of these incidents is an overt manifestation of control being affirmatively exercised. But

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[34] Samuels, an officer of Yellow, testified at length as to his satisfaction with CCM cabs, but nowhere stated or implied that the 1929 purchase was on Yellow's own initiative.

more subtle control can result from the mere existence of the power. Thus, for example, Markin is the owner of Cab Sales and Cab Sales is a CCM customer. It is doubtful if Markin, the President and principal stockholder of CCM, finds it necessary explicitly to direct the operating officials of Cab Sales to buy CCM cabs. But the compulsion arises as a direct consequence of Markin's ownership.

The same may be said of the Parmelee subsidiaries. True, in the beginning the device of management contracts was used to assure day to day control. These contracts delegated to a Parmelee subsidiary (of which Markin was adviser) the authority to supervise cab purchases. But after the pattern of control was established such a device became unnecessary and fell into disuse (except in the case of Yellow which is not wholly owned by Parmelee). The operating officials of the subsidiaries are not unaware of CCM's majority stock control in Parmelee. Under such circumstances it is absurd to suggest that those officials could exercise independent business judgment on cab purchases.

The record also makes plain that of late years the operating companies have been left no voice in their own affairs—even on minor matters. The pattern of domination applies not only to important matters like cab purchases (Gov. Ex. 328, R. 1346) but to a host of minor questions (see, e.g., Gov. Exs.

273-297 (R. 1318-1327), 336-351 (R. 1351-1355), 355 (R. 1358)).

In addition to disregarding the evidence of the exercise of control over the operating companies, the trial court has ignored the consequences of that control. From 1929 to 1942 CCM was able to sell the controlled companies 16,996 cabs and was able to sell all other companies only about 12,264 cabs. The court found this as a fact (R. 96); yet it appears to have rejected the obvious inference that CCM's striking success in this segment of the cab market was a result of the exclusion of competition. We think it clear that CCM sold 16,996 cabs to the controlled companies because, and only because, those companies were compelled to buy CCM cabs.

II

The Unreasonable Restraint and Monopolization of a Substantial Segment of Interstate Commerce Here Achieved Cannot Be Sustained as Merely the Consequence of Permissible Vertical Integration

The appellees have raised a number of defenses of law, each of which was considered and decided against them by this Court on the prior appeal. The prior decision left, in fact, but one question to be decided: can the allegations there considered be proved?

Thus, the appellees have contended that the amount of interstate commerce here involved is inconsequential, and that its restraint or monopolization is therefore not within the ban of the Sherman

Act. In the light of the evidence and this Court's explicit holding on the prior appeal, that contention is now foreclosed. It is undisputed that the controlled cab companies operate 5137 licensed cabs in four leading cities [35] and that their replacements for these cabs are purchased in interstate commerce. On the first appeal this Court held (332 U. S. 218, 225-226):

> it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. The complaint in this case deals with interstate purchases of replacements of some 5000 licensed taxicabs in four cities. That is an appreciable amount of commerce under any standard. * * *
>
> Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved.

In the face of this holding it is too late now to argue that the substantial interstate business of supplying the cab needs of the operating companies here involved is outside the antitrust laws.

It is likewise too late to argue that the exclusion

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[35] 1932 in New York City, 2595 in Chicago, 485 in Pittsburgh and 125 in Minneapolis (R. 94-95).

of cab manufacturers other than CCM from the opportunity of selling to the controlled companies is a permissible restraint. This Court held that (332 U.S. at 226):

> By excluding all cab manufacturers other than CCM from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act.

And the restriction upon the freedom of the cab operating companies to select their own cab suppliers was likewise explicitly held illegal (p. 227).

The appellees make one further defense—that the acquisition of control of the operating companies is legally unassailable on the theory that it was simply the development of permissible vertical integration. But this argument too was decisively rejected (332 U.S. at 227):

> The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those

> who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360-361, 376-377.
>
> And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.

Since the appellees cannot well avoid the effect of the above explicit language, they are forced, in effect, to the farfetched argument that the rule of the *Yellow Cab* case was modified or overruled in two cases decided at the very next term of the Court—*United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, and *United States* v. *Columbia Steel Co.*, 334 U. S. 495. The opinions in those cases not only are lacking in any indication of a withdrawal from the position taken in the *Yellow Cab* case, but constitute a reaffirmation of it.

In the *Paramount* case the Court held that vertical integration of producing, distributing and exhibiting motion pictures is not illegal *per se* and that the legality of vertical integration "turns on (1) the purpose or intent with which it was con-

ceived, or (2) the power it creates and the attendant purpose or intent" (334 U. S. at pp. 173-174). In elaboration of the first test, the Court said that vertical integration "runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs." This is in the most exact harmony with the quoted portions of this Court's decision in the *Yellow Cab* case.

The evidence in the present case conclusively shows a calculated scheme to gain control over a very substantial segment of the market for cabs in certain major cities and to restrain or suppress competition for that segment of the market. The record at the same time is barren of evidence that the bringing of the operating companies under control of CCM was an expansion to meet legitimate business needs.[36] Under the test established in the *Paramount* case, appellees' combination clearly stands condemned.

Nor does *United States* v. *Columbia Steel Co.*, 334 U.S. 495, modify or throw doubt on the decision

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[36] The failure of the appellees to attempt to develop such evidence is perhaps a result of the fundamental inconsistency of the positions which they argue. If, as they have contended, the acquisition of Parmelee control by CCM and Checker control by Markin had no purpose in relation to CCM's cab sales, then it would be hard to establish that those very acquisitions were a "normal expansion to meet the demands of a business growing as a result of superior and enterprising management * * *." (*Yellow Cab* opinion, pp. 227-228).

in *Yellow Cab*. The Court reiterated (pp. 524-525) that vertical integration is not "as such without more * * * violative of the Sherman Act." But the Court, far from disapproving the doctrine of the *Yellow Cab* case, specifically cited the case as an example of a factual setting in which an unreasonable restraint exists. Thus the Court said (p. 522) that where a complaint "charges such an unreasonable restraint as the facts of the Yellow Cab case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged."

Even if the legal issues here presented were not foreclosed by the prior appeal, the decision in *Columbia Steel* would not suggest a different result. In *Columbia Steel* it was held that under the circumstances there involved acquisition by United States Steel Corporation of the assets of Consolidated Steel Corporation, a steel fabricator located in California, did not violate the Sherman Act. The Court in reaching this conclusion considered at length the particular setting in which the Consolidated acquisition was conceived and consummated. Among the facts thus considered were that United States Steel had purchased a short time earlier, with Government approval, a war-built West Coast plant (Geneva) with mammoth rolled steel capacity; that United States Steel's bid for Geneva provided that it would erect a plant in California which would absorb part of Geneva's

output (which potentially greatly exceeded the estimated market demand); and that United States Steel, which had no fabricating plant in the West Coast area, had prepared plans prior to World War II for erecting such a plant.[37] The Court concluded from these and other facts that Consolidated's acquisition reflected a normal business expansion unaccompanied by intent to accomplish an unreasonable restraint of trade, and that the acquisition would not in and of itself effect such a restraint.

Even a superficial comparison of the facts of *Columbia Steel* with those of the instant case reveals decisive differences. This case lies wholly outside the problem which the Court believed to be posed in the *Columbia Steel* case (see p. 526), namely, whether the Sherman Act constitutes a bar to a business "entering into different stages of production." In *Columbia Steel* the Court found a normal expansion which rounded out the existing integration of United States Steel's productive operations by permitting it to manufacture on the West Coast finished goods which it was already manufacturing elsewhere. Here there is no question of integrating stages of production, but merely an acquisition of control over the ultimate consumers of taxicabs in order to capture the market represented by their cab purchases.

The effect of appellees' combination is to eliminate all play of competitive forces with respect to

[37] 334 U.S. 495, at pp. 501, 503-505, 508-509.

the movement of a product from the producer to the consumer.[38] In the situation which was before the Court in *Columbia Steel*, on the other hand, the rolled steel, the purchase of which the acquisition of Consolidated removed from the field of competition, constituted that company's raw material, and it had to market its finished product in competition with the products of many other concerns.

There are other important differences between appellees' combination and United States Steel's acquisition of the assets of a previously independent concern.

Where, as in *Columbia Steel*, no outside ownership interest survives the acquisition, intent to restrain trade can be found only in the intent with which the acquisition was made. In other words, the holding in *Columbia Steel* was, as we understand it, that if Consolidated's acquisition did not constitute an offense against the Sherman Act, no violation of the Act might be predicated upon the fact that the 100% subsidiary of United States Steel organized to continue Consolidated's business would presumably purchase its rolled steel requirements from its parent, rather than from its parent's competitors. See 334 U. S. 495, 523. In

[38] The trial judge was apparently of the view that local regulation of taxicabs may be relied upon to compel the use of efficient and reasonably priced cabs (R. 100). Even if the premise of this conclusion were correct, it could scarcely be a defense to a suit for violation of the Sherman Act. Congress has not delegated to municipalities the responsibility for keeping the channels of interstate commerce free of monopoly and unreasonable restraint.

substance there was but one entity after the acquisition of Consolidated. But the present case involves a combination to utilize stock control and other means to compel companies in which there are large outside ownership interests to purchase the cabs needed for their operations, not as a free exercise of business judgment, but in furtherance of the interests of a particular cab manufacturer. Such conduct is almost declarative of intent and purpose to restrain trade.

The facts as to both Yellow and Cab Sales illustrate the extent to which combination and conspiracy were, in the present case, central to the restraints which were imposed. CCM has never had more than a 61.75% stock interest in Parmelee and Parmelee's stock interest in Yellow has ranged from about 26% to about 30%. CCM's ownership interest in Yellow has therefore been only a little over 18%. Nevertheless the actual control over Yellow's cab purchases, and the structure of such control, established when appellees' combination was first formed, have ever since been fully maintained. As to Cab Sales, appellees' control over Yellow was used to cause Yellow to loan, through subsidiaries, $700,000 to Cab Sales to enable it to acquire the second largest cab operation in Chicago. And Markin's ownership of Cab Sales assured that the cabs which it purchased should be CCM cabs. So CCM's 18% interest in Yellow has been the lever by which it has secured a monopoly of the

business of supplying the cab requirements of Yellow and Cab Sales.

From what we have said, it is evident that the affiliations existing among the appellees have none of the characteristics of a vertically integrated enterprise. The business of carrying passengers for hire is hardly a normal extension or expansion of the business of manufacturing automotive vehicles. In addition, the operating companies are not separate entities in form only; they are to a large extent separately owned. The compulsion upon them to buy their cabs from CCM therefore cannot be defended upon the ground that it is merely a manifestation of the normal tendency of a subsidiary to buy from its parent whenever possible (compare *Columbia Steel* opinion, p. 523). On the contrary, stock control, deliberately acquired for the purpose, has been used to exclude competing manufacturers and to deprive nominally independent operating companies of the freedom to pick their cab suppliers. In the words of this Court's prior opinion in this case, "restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination." 332 U. S. at p. 227. As was the case in *United States v. Crescent Amusement Co.*, 323 U. S. 173, 189, "Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective."

III

Divestiture of All Common Interest or Control in CCM and the Operating Companies is Necessary in Order to Dissipate the Restraints and Monopolization of Trade Effected by Appellees' Conspiracy

The consistent purpose of the appellees to monopolize and restrain competition in the sale of cabs coupled with the structure of corporate control which they have erected makes it plain that injunctive relief would be insufficient to restore the segment of commerce here involved to the channels of free competition. It is obvious that if Markin continues as an officer and a major stockholder of CCM and at the same time retains ownership of Cab Sales, manufacturers other than CCM will continue to be excluded from competition for Cab Sales' business. By the same token, so long as CCM controls Parmelee, neither Yellow nor the Parmelee subsidiaries will be free to exercise independent business judgment in purchasing taxicabs; they will perforce buy from CCM. Here, as in *Schine Chain Theatres* v. *United States*, 334 U. S. 110, 128, "an injunction against future violations is not adequate to protect the public interest."

If the court's decree is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Company* v. *United States*, 332 U. S. 392, 401), the combination must be dissolved. The language of

the Court in *United States v. Crescent Amusement Company*, 323 U. S. 173, 189-190, is apposite here:

> Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity * * * to continue to act in combination * * *. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future.

CCM should be required to divest itself of all interest, direct or indirect, in Parmelee and the operating companies. Parmelee and the operating companies should be under a like direction with respect to CCM. Markin, and anyone else having an interest in both CCM and operating companies, should be put to a choice of affiliation, and required to destroy all connection as a stockholder, officer or employee either with CCM, or with Parmelee and the operating companies, as the case may be. Only by the surgery of divestiture can the monopoly and restraint of competition fostered by this conspiracy be eliminated.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed.

Respectfully submitted,

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